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SUPREME COURT, U. S.

United States Court of Appeals

For the Second Circuit

THE UNITED STATES OF AMERICA,

Appellee

—against—

JOSEPH GERNIE and EDWARD OGLIL,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF AND APPENDIX

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United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA

Appellee,

—against—

JOSEPH GERNIE AND EDWARD OGULL,

Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

Statement of the Case

Defendants-appellants herein appeal from a judgment of the United States District Court for the Southern District of New York rendered on February 19th, 1957, convicting them of violations of the Narcotics Laws of the United States (21 U. S. C. Secs. 173, 174) and of conspiracy (18 U. S. C. Sec. 371). The trial, which lasted six days, was held before the Hon. Edmund L. Palmieri, District Judge, and a jury. Appellant Gernie was sentenced to 10 years and a committed fine of $5,000 was imposed; appellant Ogull was sentenced to 5 years. Numerical references herein, unless otherwise indicated, relate to pages of the transcript of record. Those portions especially pertinent to the points hereinafter argued are set forth in the accompanying appendix.

The Indictment

The indictment, in each of the first six counts, charges that certain defendants unlawfully received, concealed, sold and facilitated the transportation, concealment and sale of certain quantities of heroin. Some of the counts included other defendants, to wit, Buzzeo and Mayer, who were not on trial. The seventh count charges conspiracy to violate the narcotic laws.

Evidence and Proceedings on the Trial

The evidence and proceedings, to the extent that they are pertinent to the several errors assigned, will be discussed in connection therewith.

Grounds of Appeal

1. The case presents no evidence whatsoever that appellant Joseph Gernie received, concealed, sold or facilitated the transportation, concealment or sale of any narcotic drugs, or that he conspired to do any of the foregoing. The trial Court erred in denying his motions to dismiss and in permitting the jury to pass upon his guilt on the basis of mere suspicion.

2. The curtailment of cross-examination regarding one Berner, a paid government informer in this and other cases, coupled with the failure to produce him or to account for his absence, contravened the recent holding in *Roviaro* v. *United States*, 353 U. S. —, 1 L. Ed. 2d 639.

3. The government improperly placed on the stand a witness who it had reason to believe would, as he did, plead the Fifth Amendment, to appellants' prejudice.

4. The trial Court erred in denying defense motion to dismiss based on the ground that entrapment was established.

5. The trial Court erroneously denied a motion for a mistrial after receiving incompetent and unresponsive testimony of the witness Wurms that appellant Ogull planned to engage in the operation of a gambling house.

6. The trial Court erroneously denied a motion to strike improper testimony that appellant Gernie had in his possession a certain marked bill more than two months after it had been paid over by a government agent to Buzzeo.

7. In charging on the credibility of witnesses, the trial Court omitted from the rule of *falsus in uno* the necessary qualification that the testimony had to relate to material facts.

Statutes Involved

TITLE 18, UNITED STATES CODE

§371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, ch. 645, §1, 62 Stat. 701.)

§173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, ch. 100, §2, 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26,

1922, ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; June 14, 1930, ch. 488, §3, 46 Stat. 586.)

TITLE 21, UNITED STATES CODE (1952), (PRIOR TO AMENDMENT OF JULY 18, 1956, 70 STAT. 570)

§174. *Same; penalty; evidence.*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173 and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556) as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States

Attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States Attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this section.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Feb. 9, 1909, ch. 100, §2(c), 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922 ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; Nov. 2, 1951, ch. §666, §§1, 5(1), 65 Stat. 767).

TITLE 21, UNITED STATES CODE (SUPP. IV, 1957) (AS AMENDED JULY 18, 1956, 70 STAT. 570)

§174. *Same; penalty; evidence.*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more

than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc. see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, §105, 70 Stat. 570).

ARGUMENT

POINT 1

The case presents no evidence whatsoever that appellant Joseph Gernie received, concealed, sold or facilitated the transportation, concealment or sale of any narcotic drugs, or that he conspired to do any of the foregoing. The trial Court erred in denying his motions to dismiss and in permitting the jury to pass upon his guilt on the basis of mere suspicion.

The determination of the correctness of our position on this point necessitates a scrutiny of the record. We proceed to examine the references of the various witnesses to appellant Gernie.

The Government's first witness was Ivan Wurms, an agent of the Federal Bureau of Narcotics. He testified at considerable length regarding his meetings with appellant Ogull, Max Berner, Philip Buzzeo and Michael Mayer, beginning April 13, 1956 (R. 26-62), including various trans-

actions involving the purchase and sale of narcotic drugs. His first mention of appellant Gernie was with reference to an occasion on June 4, 1956, when he met Buzzeo and had a conversation with him at the Ship Ahoy Bar regarding the prices of drugs (R. 58-59). They left the bar and entered an automobile, in which they drove to the Beacon Garage, at 210 West 76th Street (R. 59-60). There they parked, and he testified that he gave Buzzeo a sum of money. A little later he saw another car drive up in front of the Devonshire Garage across the street, and Michael Mayer alighted (R. 61-62). A short time later he testified that he observed appellant Gernie and Buzzeo together (R. 62). According to the witness, Buzzeo entered the Devonshire Garage, walked across the street, entered the vehicle in which the witness was waiting and told him that he had the drugs. They drove off and in the course of the trip Buzzeo handed him the drugs (R. 62-63). Certainly nothing was said so far which would indicate the slightest criminality on the part of appellant Gernie.

The next mention in the testimony of this witness with regard to Gernie relates to July 12, 1956 (R. 75). The witness said that he met Buzzeo at the Dolphin Cafe at about 9 in the evening, from which point they drove away at 10:30 and headed north to the Devonshire Garage (R. 76-77). He said that he delivered a sum of money to Buzzeo and they parked the car east of the Devonhsire Garage at 10:45 (R. 77-79). Then, the witness said Buzzeo met a man named Mosca; the two walked north on Broadway and disappeared from his view (R. 79). At about 10:55 an Oldsmobile drove up to the entrance of the Devonshire Garage, and it was driven by Gernie (R. 79). Gernie parked the car in the garage, emerged and walked west on 76th Street. He met Buzzeo, the two shook hands and they entered the side door of the Lighthouse Cafe (R. 80). At about 11 the two came out, Gernie walking about four feet behind Buzzeo (R. 80-81). Buzzeo entered the car entrance

of the garage and Gernie walked into the garage office. A little later Gernie came out through the office and entered the car, after which Buzzeo took a bag which he had on his person and handed it to the witness (R. 81-83); it was later found to contain narcotic drugs. This second casual observation of Gernie certainly does not suffice to show any criminal conduct on Gernie's part.

The foregoing constitutes a fair statement of everything that the key witness Wurms had to say concerning Gernie, and it is obvious that nothing contained in his testimony suffices to constitute Gernie's actions as being criminal in the slightest degree.

The Government's second witness was another narcotics agent, one Anthony Zirilli. He testified that he saw Gernie for the first time on August 6, 1956, at 10 P.M., at the intersection of Columbus Avenue and 67th Street (R. 151). According to the witness, Gernie drove up in an automobile, parked it and walked east to another automobile, a green Pontiac, parked near the 67th Street Garage, which the witness had previously seen driven by Mayer (R. 152). The witness testified that Gernie opened the door of the Pontiac and placed a dark package inside of it, shut the door and continued walking into the office of the 67th Street garage (R. 152). The witness then saw Gernie meet Mayer, after which Mayer left the garage, entered the Pontiac and departed (R. 152-153). There was no evidence whatsoever in the case as to the nature or contents of the alleged package. A few minutes later, the witness testified, he saw a man whom he later identified as one Edwards, meet Gernie, and saw both of them meet one Harell. Then Harell and Gernie met in the office of the garage; two or three minutes later Harell came out and drove off with Edwards. Harell and Edwards were followed by agents and were arrested along with one Mobie, whom they had met (R. 154) and found to be in the possession of heroin. With respect to Zirilli's testimony, it is submitted that it did not establish any criminal act on the part of Gernie.

A third narcotics agent, Martin Pera, testified that on June 4, 1956, he saw Buzzeo and Wurms at the Ship Ahoy Bar, from which they drove to the Lighthouse Cafe (R. 161-162). Buzzeo sat at the bar and ordered a drink; then made a telephone call at the public booth, after which he resumed his place at the bar; five minutes later appellant Gernie entered and joined Buzzeo at the bar, conversing with him for several minutes. All that the witness could hear was the bartender's "Hello, Joe," and Gernie's acknowledgment of the greeting (R. 161-163). The two had "another drink or so," following which Gernie made a telephone call. Thereafter Gernie and Buzzeo went downstairs, where the washrooms were located, reappearing in five minutes (R. 163-164). They proceeded to the bar. Then Gernie, according to the witness, walked to the window and looked out for a few minutes; they had another conversation, after which Gernie left the premises (R. 164). The witness followed Gernie, whom he saw enter the office of the Devonshire Garage, emerging thence in the company of his nephew (by marriage), Michael Mayer. The latter drove off, while Gernie returned to the Lighthouse Cafe. Thereafter Gernie and Buzzeo came out and both went into the Devonshire Garage office (R. 165-166). In a little while Buzzeo returned to the automobile where Wurms was waiting, and they drove off as Gernie stood there "watching" (R. 165-166). Gernie returned to the Lighthouse Cafe (R. 166). So much for June 4, 1956.

On July 12, 1956, Pera further testified, at 10:20 P.M., he saw Buzzeo and Wurms come out of the Dolphin Cafe and drive to the vicinity of the Devonshire Garage (R. 166-167). Buzzeo got out of the car and walked towards the Lighthouse. He was greeted by a man whom Pera "had seen often in the company of Gernie prior to that time." The two entered the cafe. At about 10:50 Gernie drove up in the car which the witness had previously seen driven by Mayer. Gernie parked in the garage entrance (R. 167-168).

As Gernie approached the cafe he was met by Buzzeo and had a brief conversation with him. They went in together and soon emerged. Buzzeo opened the door of the car at the driver's seat and partially entered for a moment. He and Gernie then went into the garage office, coming out immediately, after which Buzzeo rejoined Wurms and drove off with him (R. 168-169).

On September 18, 1956, Pera and two other agents arrested Gernie in the Lighthouse Cafe (R. 169). The witness searched him and found on his person various inconsequential papers and a wallet containing, according to Pera, $412 (R. 170). He said further (R. 171):

> "One of the $100 bills we found on Joseph Gernie at the time we arrested him bore the same serial number and was the same bill used to purchase evidence on July 12, 1956, from Buzzeo."

A motion to strike this evidence, it may be noted, was denied (R. 542-3, 586). The witness questioned Gernie concerning the ownership of the Oldsmobile car parked opposite the Devonshire Garage, and it developed that it was not registered in his name (R. 174-176), but in the name of Rose Quinn, his sister-in-law (R. 181-182). Later the witness searched Gernie's home and found $1500 in a lady's handbag, Mrs. Gernie claiming it as her own (R. 187-188); no part of that sum had the serial numbers of the marked money outstanding (R. 188). The witness admitted that on the occasions when he observed Gernie or Buzzeo in the garage office he was able to see what was happening there (R. 200).

It is submitted that all of Pera's testimony regarding appellant Gernie does not rise above the level of meetings and conversations with Buzzeo. These are matters not merely entirely consistent with innocence but utterly devoid of a single fact or circumstance pointing to the com-

mission of a crime. If riding in an automobile, telephoning, chatting, drinking, walking into a garage office, greeting a bartender or anything else can be fashioned or distorted into a picture suggestive of guilt, then every friend or acquaintance of Buzzeo's with whom he had the most casual contact during the six-month period involved should have been arrested and prosecuted as a coconspirator.

Patrick P. O'Carroll, a fourth narcotics agent, testified that he saw Gernie at various times in June, July and August (R. 202-204). On August 2, 1956, in the vicinity of the West End Garage, between Columbus Avenue and Central Park East, he saw a Plymouth car drive up and park. The occupants were Gernie and two men whom the witness later learned to be Jackson and Harell. The latter walked into the garage and returned to the car in about three minutes. Immediately thereafter Mayer came out to his own car, and both cars drove off (R. 204-205). The witness and agent O'Connor followed Mayer's car to 307 West 69th Street, where Mayer went into that building for ten minutes. The witness testified that he saw the first car parked down the street. When Mayer came out, Mosca and Gernie were with him (R. 205-206); they talked on the street a minute or two; Mayer returned to his car and drove away; Mosca walked north to West End Avenue; and Gernie went back into the building (R. 206-207). It is needless to remark that O'Carroll's testimony contained nothing to implicate Gernie.

The Government's fifth witness, George J. O'Connor, was also a narcotics agent (R. 209). So far as Gernie was concerned, he "corroborated" the testimony of Pera that on June 4, 1956, Gernie was looking out of the window as Mayer drove by the Lighthouse (R. 209-210); and O'Carroll's testimony as to Gernie's going to the premises at 307 West 69th Street on August 2, 1956, (R. 212-216). This witness added nothing which could fairly be viewed as implicating Gernie in any degree.

Two chemists testified for the Government regarding their respective analyses (R. 257, 276) of various drugs in no way traced to or connected with Gernie.

Benjamin Harell, a defendant who had pleaded guilty (R. 295), was called as a witness but when asked where he obtained the heroin found upon him when he was arrested, he invoked the Fifth Amendment (R. 297), in which he was sustained by the Court (R. 309-312).

Donald E. Miller, an agent and attorney in the Bureau of Narcotics, testified that he saw Buzzeo talking to Gernie in the Lighthouse on June 4, 1956 (R. 312-313); saw Gernie look out of the window, leave the restaurant, enter the garage and return to the restaurant (R. 314). He saw Buzzeo and Gernie emerge from the restaurant, the former driving off with Wurms and Gernie walking back into the restaurant (R. 314-315). On July 12, 1956, he saw Buzzeo and Gernie walk into the Lighthouse and thence into the garage (R. 318). All of the foregoing was obviously cumulative, as was the testimony of the same witness about the events of August 6, 1956 (R. 321-323).

The foregoing constitutes a digest of the Government's case in chief against appellant Gernie, who duly moved for a directed judgment of acquittal (R. 328). The argument was made in his behalf that no evidence had been adduced indicating sale, receipt, possession or facilitation; that there was no proof of even constructive possession by him; that the Government had shown no participation by him in any conspiracy, no act in furtherance thereof, nor even anything tending to establish his awareness of the existence of a conspiracy; and that the circumstantial evidence, if any, barely rose to the level of a suspicion (R. 328-332). The motion was denied, the Court declaring the evidence sufficient to find both appellants guilty of the substantive and conspiracy charges (R. 335). A like motion was denied on the entire case (R. 543).

Appellant Ogull testified at great length (R. 356-459) concerning his dealings with Berner, Buzzeo and Wurms, but his testimony includes no mention of appellant Gernie.

Michael Mayer, a defendant who had pleaded guilty (R. 461-462), and, as has been indicated, a nephew of Gernie by marriage, testified that, so far as the witness knew, Gernie had no connection with or knowledge of any narcotic transactions (R. 464-465). On cross-examination he denied that upon his arrest he had implicated Gernie (R. 487-488, 498-501). To impeach this witness, the Government recalled Pera, who testified that after Mayer's arrest he made a statement involving Gernie (R. 516-520). There is no question that the prosecution capitalized upon this golden opportunity to supply, so far as the jury was affected, the shortcomings in its proof. After some vacillation on the subject (R. 518, 538-539), the Court finally charged the jury that Pera's testimony on this point could be considered only for the purpose of discrediting Mayer and not "as proof of the guilt or innocence" of either appellant (R. 545-546) or "as affirmative evidence against the defendants" (R. 589). It is a fair assumption that this subtlety eluded the jury.

Despite the elaborate and extended surveillance which the record manifestly discloses, the Government's agents adduced nothing which by the most strained construction tends to establish appellant Gernie's guilt or warranted the submission of the issue to the jury. Even if there were suspicious circumstances—although we fail to perceive any—they would not replace the salutary requirement of actual proof. As this Court ruled in *United States* v. *Buchalter*, 88 F. 2d 624 (by Chase, *Circ. J.*):

> "Difficulty of proof is no substitute for actuality of proof and an accused is presumed to be innocent and entitled to be acquitted until proved guilty as charged beyond a reasonable doubt. Here there were, indeed, many suspicious circumstances to lead to

> the conclusion that Buchalter was guilty, but there was no substantial evidence to overcome the presumption of innocence, and so it was error to deny his motion."

Similarly, in *Karchmer* v. *United States*, 61 F. 2d 623, the Seventh Circuit held (by Evans, *Circ. J.*):

> "We are not unmindful of the rule which makes the jury the sole judge of facts over which there is a conflict. We are not intending to usurp any of the jury's prerogatives. Had the record presented a case where conflicting inferences arose, or where the full significance of facts necessitated measurement and weighing by a jury, we would not disturb the verdict. But the verdict, as we view it, rests upon speculation and conjecture. Such being the fact, the case should not have been submitted to a jury: A verdict which finds its only support in conjecture and speculation cannot stand."

In the recent case of *Vick* v. *United States*, 216 F. 2d 228, Rives, *Circ. J.*, wrote for the Fifth Circuit:

> "Appellant may be guilty, but his conviction cannot rest upon mere conjecture and suspicion. The evidence does not prove him guilty beyond a reasonable doubt and is not sufficient to warrant the jury in so concluding. The judgment is, therefore, reversed, with directions to grant the appellant's motion for judgment of acquittal."

To like effect is the recent Tenth Circuit decision in *Thomas* v. *United States*, 239 F. 2d 7, where the evidence against appellant was held to create no more than a suspicion of guilt of a violation of 21 U. S. Code Sec. 174.

The inconsequential circumstance of appellant Gernie's association with a violator of the law is indicated by deci-

sions such as that of the Eighth Circuit in *O'Brien* v. *United States*, 299 F. 568, where Symes, *D. J.*, wrote:

> "The presumption of innocence in his favor is not overcome, in the absence of other proof connecting him with the crime, by the fact that he was often seen with one who committed the offense, or knew it was to be committed, or was a spectator thereof."

The last few elements stressed in the foregoing quotation, inadequate as they were held to be, are quite lacking in the case at bar.

Whether the acts and conduct of appellant Gernie, as described by the several witnesses, be regarded separately or in the aggregate, they do not have the logical or probative quality essential to sustain a verdict of guilt. If the Government's evidence "is consistent with a reasonable and rational hypothesis of innocence, there can be no conviction." (McDermott, *Circ. J.*, writing for the Tenth Circuit, in *Eierman* v. *United States*, 46 F. 2d 46.) There is no need again to detail the succession of innocuous observation which the Government arranged into an alleged prima facie case. The more closely they are scrutinized, the more inevitably they compel the conclusion of insufficiency. If so shabby a substitute for proof may be invoked to justify a criminal conviction, then no man's liberty is safe.

POINT 2

The curtailment of cross-examination regarding one Berner, a paid Government informer in this and other cases, coupled with the failure to produce him or to account for his absence, contravened the recent holding in *Roviaro* v. *United States*, 353 U. S. —, 1 L. Ed. 2d 639.

The Supreme Court of the United States has recently had occasion to denounce the practice of reliance upon the faceless informer. Although, as the majority opinion by Mr. Justice Burton declared (footnote 8), "the record contains several intimations that the identity of John Doe was known to petitioner and that John Doe died prior to the trial," the trial Court's ruling that the prosecution might supposedly and officially withhold disclosure of his identity was held to be reversible error. John Doe was an undercover Government employee, who had taken a material part in bringing about the defendant's possession of the heroin which was the basis of the prosecution. *Roviaro* v. *United States*, 353 U. S. —, 1 L. Ed. 2d 639. Naturally in that case the Government neither produced nor made the witness available, although other Government agents testified at length concerning John Doe's alleged meetings and transactions with the defendant. The Court discussed the nature of the privilege of law-enforcement officials to withhold the identity of persons who furnish information of violations. Certain observations on the subject are most pertinent herein, for the Court said:

> "The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has

been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

"A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the the privilege must give way. In these situations the trial Court may require disclosure and, if the Government withholds the information, dismiss the action."

The opinion contains, in addition, the following significant language on the subject of a defense of entrapment:

"Petitioner's opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment . . .

Finally, the Government's use against petitioner of his conversation with John Doe while riding in Doe's car particularly emphasizes the unfairness of the nondisclosure in this case. The only person, other than petitioner himself, who could controvert, explain or amplify Bryson's report of this important conversation was John Doe. Contradiction or amplification might have borne upon petitioner's knowledge of the contents of the packages or might have tended to show an entrapment."

If the unavailability of the witness was held to outweigh the privilege of cross-examining a Government witness who did testify, what then are we to say of a situation (as herein) where a full cross-examination was denied?

At the outset of the trial of the instant case, counsel for appellant Ogull stated to the Court that he believed Maxwell Berner, a special employee of the Narcotics Bureau, might be a witness in the case; he had known Berner for many years, had searched and was unable to find him; Berner had been employed by the Government in many cases involving narcotics; his testimony might have a bearing upon an issue of entrapment; counsel therefore wanted the Government to produce Berner (R. 7-9). The Assistant United States Attorney, asked by the Court whether Berner was available, answered, "To the best of my knowledge he is not available. We can't produce him." He stated further that he did not intend to use him (R. 9). Thereupon defense counsel declared (R. 9-10):

> "In view of the fact that I am told that Mr Berner is not to be used by the Government, I now feel that it is a very unfair method of prosecuting in this case because Berner, the evidence will show, was a Government agent or employee in this case, who participated in all of the conversations and, as such, he should be produced here by the Government and not force the defense to attempt to produce him, since he is their paid agent, to make out a case here as against any one or as against these defendants."

Counsel was quite correct in his anticipation that Berner would be a key figure in the prosecution. Narcotics Agent Wurms, the Government's principal witness, began by testifying that Berner introduced him to Ogull and to Buzzeo (R. 27-29). This was the inception of all of the alleged narcotics transactions. The witness had been introduced to Berner by Group Leader Amato of the Narcotics Bureau

(R. 90). Berner worked on various narcotics cases, being employed by the Bureau from November, 1955, until September, 1956, during which time he was paid approximately $2,800 by the Bureau (R. 95-96). Yet scarcely four months after the termination of his employment, when this case came to trial, the Government was taking the position that he was not available and could not be produced—this declaration not being sworn testimony but merely a statement on the record.

In the course of appellant's (Ogull's) motion to dismiss, considerable stress was placed upon the circumstance that Berner, who initiated everything in the way of introductions and inducing the sale of narcotics, was not available or subject to examination (R. 332-335).

In a case presented in the foregoing fashion, the least that could be said regarding both appellants' position is that they were certainly entitled to the fullest cross-examination of the Government's witnesses regarding Berner and his machinations, the part he played and what sort of individual he was. Nevertheless, we find the Court below repeatedly sustaining the Government's objections to questions directed to that end.

Thus, when Agent Wurms said that Berner was in the hat frame business, he was asked (R. 92):

> "Did you learn from Max Berner how he came to go into that business? Just tell us yes or no."

An objection to this question was sustained, and the defense was prevented from showing that the alleged legitimate occupation may have been a blind to cover his work as an informer.

Secondly, when Wurms was asked (R. 93):

> "Do you know how many convictions if any Max Berner had?"

the Court sustained an objection, saying Berner's credibility was not an issue. It should be obvious that defendants were entitled to have the jury apprised that Berner was a multiple ex-convict, whose background might well affect any scruples touching his operations. Also, information of this character, so readily obtainable by prosecuting officials, is generally a closed book to a defendant.

Thirdly, regarding Berner's first employment by the Bureau of Narcotics in November, 1955, Wurms was asked (R. 95):

> "Do you know if he had just come out of jail at that time?"

This, too, was excluded, and pertinent information withheld from the jury accordingly.

Fourthly, after Wurms testified that he did not know Berner's residence address at the time of the trial and that he had met him from time to time near the Narcotics Bureau office, he was asked (R. 101-102):

> "How did you arrange to contact him?"

An objection was sustained, despite the express assertion of counsel (R. 103):

> "I think I indicated to your Honor this morning before the trial commenced, and when I moved to have Berner brought here, because I feel that the Government knows where Berner is. I feel from the investigation that I have conducted that Maxwell Berner was hired by the Government as a special employee and my client, the defendant Ogull, was then trapped into getting into the picture through Maxwell Berner.
>
> "My purpose is to show that they had discussed other business and so did this witness who is on

> the stand, before Berner led my man to do certain things which are charged here. I feel it is entrapment and I want to bring it out by this witness."

Despite the explanation the trial Court reiterated that the objection was sustained, and due exception was noted (R. 105). It is submitted that this was an inquiry of the utmost importance. In a trial which was destined to continue for another week, the defense was foreclosed from ascertaining the means whereby the Government's representatives kept in touch with the informer, and inferentially from obtaining information which might well have permitted Berner to be located. Wurms apparently had no difficulty in getting in touch with Berner whenever it was expedient. Appellants surely had the right to procure compulsory process to have the benefit of his attendance at the trial. But the trial Court by its ruling obstructed the effort. "The law is not a game" (Ehrlich, "Die Juristische Logik"), and neither the prosecution nor any of its agents should be permitted to take a position calculated to or having the necessary effect of withholding competent and material testimony. Certainly a cat-and-mouse policy in the matter of the whereabouts of an important potential witness calls for no imprimatur of approval. Particularly when human liberty is at stake, a flagrant course of concealing or suppressing a source of evidence, however subtly engineered, may not properly be viewed as other than reprehensible. It would appear that the learned Court below failed to appreciate the significance of the inquiry.

At this point in the proceedings the Assistant United States Attorney said in what appears to be carefully chosen language (R. 103-104):

> "May the record show that there is nothing to indicate that the Government has any knowledge of Berner's present whereabouts."

Not that the Government was ignorant thereof, but merely that such ignorance had not yet been established by sworn testimony or as matter of record; not that the Bureau of Narcotics was out of touch with Berner, but only the prosecutor; not that the Government's agents had not conferred with Berner that very morning, but simply that in the afternoon he had proceeded to some unknown destination. Quite consistently with the foregoing declaration, Berner may well have been in conference with the Narcotics Bureau an hour before. This was said at a time when a more forthright assurance was manifestly in order. As for defense counsel's indication that he desired Berner's presence in Court, the Assistant United States Attorney said (R. 104):

> ". . . This is the first time I hear that he requires Berner's presence here."

That assertion was not quite accurate, for counsel had earlier stated (R. 8-10):

> "I therefore ask your Honor to ask the Government to have Mr. Berner here for me so that I might speak with him, because if the Government does not call him as a witness, and I feel the Government should, I might have to . . .
>
> "I am asking your Honor to ask the Government to produce him so I might speak with him . . .
>
> ". . . He should be produced here by the Government . . ."

The cumulative effect of the foregoing rulings was such as to hamper the defense in its efforts to elicit information having a material bearing upon the issues of the trial, more particularly the defense of entrapment, and consequently upon the determination of the case.

Attention is directed to the holding in *United States v. Reynolds*, 345 U. S. 1, 97 L. Ed. 727, where Mr. Chief Justice Vinson wrote:

> "The Government can invoke its evidentiary privileges only at the price of letting the defendants go free. The rationale of the criminal cases is that, since the Government which prosecutes a case also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its privileges to deprive the accused of anything which might be material to his defense."

The disclosure of how the Government's representatives managed to keep in contact with Berner may well have involved the revelation of secret or confidential information. But this consideration cannot outweigh the needs of a defendant charged with crime, or his right to be apprised how he may locate a material witness. Nor may this be viewed as being discretionary with the trial Court, for in the recent holding in *Jencks* v. *United States*, 353 U. S. —, 1 L. Ed. 2d 1103, Mr. Justice Brennan wrote:

> "The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession."

It is submitted that the application of the foregoing principles to the errors indicated calls for a reversal of the judgment of conviction.

POINT 3

The Government improperly placed on the stand a witness who it had reason to believe would, as he did, plead the Fifth Amendment, to appellant's prejudice.

The Government called as a witness one Benjamin Harell, an offender who had pleaded guilty and had received a five-year sentence (R. 295-296). He was asked by the Assistant United States Attorney where he had obtained the heroin that was taken from him when he was arrested in August, 1956, and he invoked the Fifth Amendment (R. 297). A lengthy colloquy followed, at the conclusion of which the Court sustained the witness's claim of immunity (R. 296-312). The prosecutor subsequently admitted that one Muldow, who had been counsel for Harell, had indicated the likelihood of such a course, thus (R. 541-542):

> "Harell stated to me that what now disturbed him was he was afraid he would be injured. Harell stated to me what bothered him was he had to go out and live on the street afterwards. I then discussed this with Mr. Muldow of the Legal Aid Society, who represented him. He informed me that he is so terrified he insisted on pleading guilty to the full indictment, even though at that time the Government was not pressing the indictment under Sections 173 and 174 which called for a five year minimum mandatory sentence upon conviction.
>
> "Mr. Muldow said to me, because Harell was so terrified, Mr. Muldow felt—not because Harell was terrified but Mr. Muldow broached the argument that, whether he could possibly plead the Fifth Amendment. Mr. Muldow thought he could and I thought he could not. There the matter rested. That is the extent of my intimation there would be a plea."

The Court ultimately charged the jury not to consider Harell's claim of privilege as evidence against the defendants (R. 586-587).

Counsel for appellant Gernie urged that the Government had received indications (as shown by the foregoing quoted passage) that Harell would be a reluctant witness; and that in view of the other testimony as to Harell's meetings with Gernie, Harell's being placed on the stand and his prompt plea of the Fifth Amendment had created an aura of prejudice against Gernie, the curing of which by instruction to the jury was doubtful (R. 535-537).

We believe it to be the sound rule that matters relating to the validity or tenability of the assertion of privilege by a witness should be investigated by the trial Court out of the presence of the jury. See *Wilmering* v. *United States*, 4 F. 2d 209, cert. den. 267 U. S. 605, 69 L. Ed. 810. The circumstances herein at the very least placed the Government on notice that it might be confronted by such a claim by Harell, and a fair regard for appellants' rights required preliminary ascertainment by the Court apart from the jury.

The manner in which the unusual incident arose could not but be injurious to appellants. To begin with, a claim of privilege by a witness is sufficiently rare in the course of a criminal trial to make a solid impact upon the minds of the jurors. The natural, indeed casual, reaction of any juror might be along the following lines: This fellow Harell admitted he was guilty; the Government called him as a witness to implicate the defendants; he invoked the Fifth Amendment not so much to protect himself as to shield the others; and the reason he did that was either by agreement with the defendants or because he was afraid that they might retaliate against him in some way; in any event, that settles it and removes any doubt as to their guilt. However salutary the Fifth Amendment may be as a bulwark against oppression and as a constitutional shield

for the innocent and guilty alike, it certainly may not be employed as an instrumentality to engender ugly suspicions against defendants on trial for their liberty. Retrospectively it may be concluded that the trial would have been fairer without this spectacular incident, but this is not enough. Once the Government was aware or had good reason to believe that Harell was inclined to such a course, the question should have been made the subject of preliminary exploration. The course actually pursued was another of the various occurrences cooperating to make the trial an unfair one.

POINT 4

The trial Court erred in denying defense motion to dismiss based on the ground that entrapment was established.

From the very outset (R. 26-31) it is clear from the testimony of the Government's chief witness, Agent Wurms, that he, acting in conjunction with the special employee, Maxwell Berner, induced codefendant Buzzeo to sell narcotics and that appellant Ogull was used as an intermediary for that purpose. It would be pointless to quote virtually the entire record to show that there was no evidence to negative this conclusion. Naturally, if Ogull was entrapped, there would be nothing else in the case to involve appellant Gernie—although, as argued elsewhere, even the entrapment transactions do not in the slightest degree establish his guilt. Ogull's own testimony likewise showed the entrapment, although we do not rely thereon for this point. A motion was made on his behalf as follows (R. 543):

> "In view of the testimony that the Government's special employee improperly induced the defendant Ogull to commit the crimes charged in the indict-

ment I respectfully ask your Honor to dismiss the indictment."

This motion was denied.

The leading case on the subject of entrapment is *Sorrells* v. *United States*, 287 U. S. 435, 77 L. Ed. 413, where Mr. Chief Justice Hughes wrote:

> "The Federal Courts have generally approved the statement of Circuit Judge Sanborn in the leading case of Butts v. United States (C. C. A. 8), 18 A. L. R. 143, 273 Fed. 38, supra, as follows: 'The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.' The judgment in that case was reversed because of the 'fatal error' of the trial court in refusing to instruct the jury to that effect."

The separate concurring opinion in the same case by Mr. Justice Roberts, with Mr. Justice Brandeis and Mr. Justice Stone agreeing, stated:

> "Public policy forbids such sacrifice of decency. The enforcement of this policy calls upon the court, in every instance where alleged entrapment of a defendant is brought to its notice, to ascertain the facts, to appraise their effect upon the administra-

> tion of justice, and to make such order with respect to the further prosecution of the cause as the circumstances require."

It is also noteworthy that the Court in the same case cited with approval *United States* v. *Lynch* (D. C. N. Y., 1918), 256 F. 893, wherein the facts are noteworthy. There Hough, *D.J.*, wrote:

> "A man who expected to be an officer in the United States Army, and had a very good reason to believe that he would, was asked what he would want out of a government contract over which he seemed—only seemed—to have some control. He replied most properly, most honorably, 'nothing', because he was about to become an officer; and there the matter dropped on that occasion."

Later, at the instigation or by the order—and the Court said it made no difference which—of government officers comprising the Department of Military Intelligence, the offeree told defendant that he had reconsidered the question and in effect asked for the money. The Court held that this constituted "provoking and creating a crime", saying further:

> "Border line cases are difficult, and doubtless it is usually best to leave the matter to the jury when and if, in view of the evidence, a reasonable man would be justified in holding that the accused had the intent or desire to do that for which he was indicted, and seized and swallowed the bait that was laid for him."

On the foregoing facts the Court held that the prosecution was "an endeavor to punish a crime which would never have been committed if it had not been for the request of the government officer", and thereupon peremptorily advised the jury to acquit the defendant.

The Court is referred to the similar holdings in decisions in *Woo Wai* v. *United States* (C. C. A. 9, 1915), 223

F. 412; *Sam Yick* v. *United States* (C. C. A. 9, 1917), 240 F. 60; *Gargano* v. *United States* (C. C. A. 5, 1928), 24 F. 2d 625; *Ybor* v. *United States* (C. C. A. 5, 1929), 31 F. 2d 42; *Newman* v. *United States* (C. C. A. 4, 1924), 299 F. 131, and *Capuano* v. *United States* (C. C. A. 1, 1925), 9 F. 2d 41.

POINT 5

The trial Court erroneously denied a motion for a mistrial after receiving incompetent and unresponsive testimony of the witness Wurms that appellant Ogull planned to engage in the operation of a gambling house.

When the witness Wurms was called in rebuttal—appellant Ogull having told of a conversation regarding his plan to acquire some property near Lake Ronkonkoma for a barbecue stand, bar and restaurant (R. 360)—Wurms testified that on August 10th, 1956, he received a telephone call from Ogull and met him at the West Side Airlines Terminal Restaurant, 46th Street and Eighth Avenue (R. 511). Buzzeo arrived and the three of them had a conversation regarding a trip Wurms said he planned to take to Cuba (R. 512). Then came the following question (R. 513):

> "Was it on that occasion that you discussed real estate?"

Instead of giving a yes or no answer, Wurms said:

> "Phil Buzzeo mentioned a piece of property that a friend of his had in California that he had just returned from California and this person wanted to sell it. It was a restaurant and, I believe, in the back they could carry on some gambling games."

Counsel for Ogull moved for a mistrial, his motion was denied and exception taken (R. 513-514).

The clear effect of this testimony was to convey to the jury the impression that Ogull was contemplating or considering opening a gambling house in California. Such an operation would be a crime under the laws of California (see California Penal Code, Sec. 330). Any such imputation—not coming within any of the recognized exceptions to show motive, intent or a common scheme—constituted a grave violation of the rights of appellant Ogull. We believe there is no proposition more firmly established than the one forbidding the proof or suggestion of other crimes in the course of a criminal prosecution. The citation of fundamental authority on the point is indeed superfluous, and we therefore content ourselves with reference to several recent illustrative cases.

In *Fallen* v. *United States*, 220 F. 2d 946, cert. den. 350 U. S. 924, 100 L. Ed. 808, proof even of like offenses, where not needed to establish criminal motive or intent, was held by the Fifth Circuit to be reversible error.

In *Helton* v. *United States*, 221 F. 338, a prosecution for illegal acquisition of marijuana, the same Court held it to be reversible error to introduce proof of defendant's admission to a federal agent that he had been smoking marijuana—despite the trial Court's direction that the evidence be stricken from the record.

In *Kraft* v. *United States*, 238 F. 2d 794, the Eighth Circuit held it to be reversible error to admit proof of another offense even though of the same character as the one charged in the indictment, discussing at some length the unfairness of introducing such collateral issues.

In *United States* v. *Meagley*, 239 F. 2d 637, a Seventh Circuit case, the defendant was prosecuted for stealing medical supplies from the Government. A Government witness testified that he had obtained from the defendant a written statement regarding an entirely different incident. When asked whether the incident was connected with

the subject-matter of the trial, the witness said, "The signed statement involved the forgery of a prescription." No motion was made that the answer be stricken and the trial judge took no action. It was contended on behalf of the Government on appeal that there was nothing to indicate and no reason to believe that the prosecutor anticipated the answer that was given. It will be observed that the answer did not even specifically state that the defendant had committed the forgery; for all that appears, he might merely have given such information as he had on the subject, and it might have involved entirely different parties. Nevertheless, the Court held that the testimony was reversible error, saying it was not too much concerned with the innocence or guilt but that the vital requirement was a fair trial. The Court cited in support of its views the controlling decisions in *McCandless* v. *United States*, 298 U. S. 342, 80 L. Ed. 1205; *Bihn* v. *United States*, 328 U. S. 633, 90 L. Ed. 1495; and *Kotteakos* v. *United States*, 328 U. S. 750, 90 L. Ed. 1557.

In *Massei* v. *United States*, 214 F. 2d 895, a prosecution against a police officer for evading income taxes, the First Circuit held it reversible error to receive admissions by defendant that he had previously received graft.

The foregoing cases are but a few of the numerous authorities unanimously holding receipt of evidence of the type attacked a serious and prejudicial invasion of the rights of a person accused of crime. The public abhorrence of the narcotic traffic is such that an individual charged with such an offense faces a difficult task in defending against the indictment, and the interests of justice require that he be not subjected to the additional burden of insinuations of complicity in other crimes.

POINT 6

The trial Court erroneously denied a motion to strike improper testimony that appellant Gernie had in his possession a certain marked bill more than two months after it had been paid over by a Government agent to Buzzeo.

Appellate Gernie was arrested on September 18, 1956 (R. 169). He was searched and was found to have $412 in cash on his person, including, Pera testified, a $100 bill which had been used by a Government agent to purchase narcotics from Buzzeo on July 12, 1956 (R. 170-171). In view of the fact that sixty-eight days had elapsed between the two incidents—apart from other logical considerations—a motion was made to strike the testimony regarding the identity of the bill. Not only was this motion denied (R. 542-543), but the instructions to the jury compounded the erroneous ruling in the following language (R. 586):

> "Later on, on September 18th—this is over two months later—Gernie is arrested. They searched Gernie and found one of these $100 bills on his person, and that is Government's Exhibit 6-A in this case.
>
> "You have to ask yourselves how did he get this money? Was it a fortuitous circumstance? Did it have something to do with the narcotics traffic or is he being unjustly and improperly blamed for something that he had nothing to do with?"

We submit that it was error to receive this proof, to deny the motion to strike and to permit the jury to consider it as evidence of guilt. Should the ruling below be deemed sound, every individual chancing to handle a

banknote originally marked as evidence of crime would be doing so at his peril. The modes whereby this bill might have come into appellant's Gernie's possession are too myriad to admit of enumeration. Buzzeo might have paid a lawful debt therewith. He might simply have asked Gernie to change it. The money could have passed in the course of a card game. It could have gone through a dozen intermediate hands before Gernie ever saw it. Indeeed, it could have been stolen. Yet none of these means, to say nothing of legion others, carries with it any semblance of participation in narcotics traffic. To render evidence of this type admissible, the least requirement should be some close proximity in point of time and incident. Otherwise the proof is of such scant or conjectural value as to have its capacity for prejudice far outweigh any possible probative force.

In *Williams* v. *United States*, 168 U. S. 382, 42 L. Ed. 509, which we cite as somewhat analogous, the defendant in an extortion prosecution was shown at the time in question to have made bank deposits far in excess of his salary. In holding this to be reversible error, the senior Mr. Justice Harlan wrote:

> "There was no such connection shown between the possession by the defendant of the sums specified in the affidavit and bank books, and the alleged extortion by him of two named sums from certain persons, under color of his office, as required him to explain how he acquired the moneys referred to in the affidavit and bank books. The manifest object and the necessary effect of this evidence were merely to give color to the present charges, and to cause the jury to believe that the accused had in his possession more money than a man in his condition could have obtained by honest methods, and, *therefore*, he must be guilty of extorting the two sums in question. The present case does not come within the

> rule of evidence referred to by the learned court . . . The accused was entitled to stand upon the presumption of his innocence, and it cannot be said from anything in the present record that he was under any obligation arising from the rules of evidence to explain that which did not appear to have any necessary or natural connection with the offenses imputed to him. In our judgment the court, under the circumstances disclosed, erred in not excluding the affidavit and bank books as evidence, as well as in what it said to the jury on that subject."

The rationale of the foregoing decision calls for a holding that the trial Court erred herein.

It has been held by various Courts that proof of a defendant's possession of money is inadmissible in the absence of a clear connection with the commission of the crime charged. See *Turner* v. *State*, 124 Ala. 59, 27 So. 272; *Leath* v. *State*, 132 Ala. 26, 31 So. 108; *People* v. *McGeoghegan*, 325 Ill. 337, 156 N. E. 378. Most recently, in *Lee* v. *United States*, 245 F. 2d 322 (advance sheets of August 26, 1957), it was held reversible error to admit proof that certain bills found in appellant's apartment and on his person were included in payments by a Narcotics Bureau agent for heroin, the Ninth Circuit writing (by Hamley, *Circ. J.*):

> "This money was neither contraband, counterfeit nor stolen. Its mere possession by appellant or any one else would not be a crime. . . . It did tend to prejudice appellant greatly in the eyes of the jury."

POINT 7

In charging on the credibility of witnesses, the trial Court omitted from the rule of *falsus in uno* the necessary qualification that the testimony had to relate to material facts.

In charging the familiar rule relating to the testimony of a witness which was false in part, the Court said (R. 589):

> "What do you do with witnesses if you find they told wilful falsehoods? The law says that you can either reject everything on the ground that all of the testimony is tainted by that falsehood or that you can accept that which is credible and reject that which is incredible. That is what the law says you can do with respect to witnesses who you believe told a wilful falsehood"

The foregoing is not a correct exposition of the law in that it makes no mention of the essential circumstance that the testimony must relate to a material fact. As is stated in Abbott's Criminal Practice, 4th Ed., Sec. 680 (emphasis supplied):

> "The Court may properly charge the jury that if they believe that a witness testifying *as to matters material to the issues* has wilfully testified falsely *as to any fact before them* they are authorized to, but not bound to disbelieve his entire testimony."

In 23 C. J. S. 827 it is set forth as an integral part of the rule "that a witness has wilfully and corruptly testified falsely as to any material fact," and it is further said:

> "The instructions should be correct as to their characterization of the false testimony as wilful or corrupt or as given knowingly or intentionally and

as to the necessity that the false testimony be material."

The omission of the necessary qualification is reversible error. *People* v. *Parsons*, 192 App. Div. 841, 183 N. Y. S. 100; *People* v. *Engargola*, 255 App. Div. 980, 8 N. Y. S. 2d 4.

CONCLUSION

For all of the foregoing reasons, the judgment appealed from should be reversed.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Appellants.

APPENDIX

Docket Entries

(A)

THE UNITED STATES

vs.

EDWARD OGULL counts 1-2-3-7
PHILIP BUZZEO counts 1-2-3-7
JOSEPH GERNIE counts 2-3-4-5-6-7
MICHAEL EDWARD MAYER counts 2-4-5-6-7

Violation—

Title 21 Secs. 173-174 USC
Title 18 Sec. 371 USC
Title 26 Sec. 7237 USC
Unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transp. concealment and sale of heroin.
Unlaw. possession of heroin.
Conspiracy to violate the Narcotic laws.
7 Counts

DATE	PROCEEDINGS
10-19-56	Filed Indictment.
10-23-56	Joseph Gernie pleads not guilty. Bail of $30,000. in C 151-90 to be re-written to cover this indictment.
	Michael Edward Mayer pleads not guilty. Bail of $10,000. in C 151-90 to be rewritten to cover this indictment. Bryan, J.
10-25-56	Deft. Edward Ogull Pleads not guilty—Bail Continued ($3,500). Bryan, J.
10-25-56	Deft. Philip Buzzeo Pleads not guilty—Bail continued ($10,000) Bryan, J.

Docket Entries

DATE	PROCEEDINGS
11- 2-56	Filed affidavit of Malcolm Monroe, Assist U. S. Attorney for a Writ of Habeas Corpus ad Prosequendum for deft Joseph Gernie dated 11-1-56.
(B)	
2- 6-57	Filed affidavit of Jerome J. Londin, Assist. U. S. Atty dated 2-6-57 for a writ of Habeas Corpus ad Testificandum for Benjamin Harrell, Jr. Iss. Writ. Ret. forthwith.
2- 4-57	Deft. Philip Buzzeo withdraws plea of not guilty and pleads guilty to counts 1-2-3 and 7. Bail revoked. Sentence set for 2-25-57 at 10:15 A.M. Remanded. Palmieri, J.
	Deft. Michael Edward Mayer withdraws plea of not guilty and pleads guilty to counts 2-4-5-6 & 7. Bail revoked. Sentence set for 2-25-57 at 10:15 A.M. Remanded. Pre-sentence report ordered. Palmieri, J.
2- 4-57	Trial begun as to Defts. Ogull and Gernie before Judge Palmieri and jury.
2- 5-57	Trial cont'd.
2- 6-57	Trial cont'd.
2- 7-57	Trial cont'd. Count 4 withdrawn by Government. Government rests.
2- 8-57	Trial cont'd.
2-11-57	Trial cont'd. and concluded. Jury retires to deliberate. Jury returns verdict of guilty as

Docket Entries

DATE	PROCEEDINGS
	charged in counts 1-2-3 and 7 as to Deft. Edward Ogull, and guilty as charged in counts 2-3-4-5-6 and 7 as to Deft. Joseph Gernie. Both defendants move to set verdict aside—Denied. Government moves to remand Deft. Ogull—Granted. Both defendants remanded. Sentence set for 2-19-57 at 10 A.M. Palmieri, J.
2-11-57	Filed a true copy of a writ of habeas corpus ad testificandum for Benjamin Harrell, Jr. dated 2-6-57. and entered Marshal's return dated 2-7-57. Writ satisfied 2-7-57. Palmieri, J.
2-19-57	Filed Judgment as to Edward Ogull—Sentence—Five Years on counts 1-2-3 and 7 to run concurrently at a place of confinement to be designated by the Atty. Genl. of the U. S. Fined $1. on each of counts 1-2-3 and 7. Fines remitted. Remanded. Palmieri, J.
2-19-57	Filed Judgment #61442 as to Philip Buzzeo—Sentence—Five Years on counts 1-2 and 3 and Six Years on count 7 to run concurrently at a place of confinement to be designated by the Atty. Genl. of the U. S. Fined $1. on each of counts 1-2 and 3. Fines remitted. Fined $5,000 on count 7. Fine on count 7. to be paid or to stand committed until he is otherwise discharged according to law. Remanded. Palmieri, J.
2-19-57	Filed Judgment as to Michael Edward Mayer—Sentence—Five Years on count 2. Five Years and Six Months on counts 4-5-6 and 7 to run concurrently at a place of confinement to be

Docket Entries

DATE	PROCEEDINGS
	designated by the Atty. Genl. of the U. S. Fined $1. on count 2. Fine remitted. Remanded. Palmieri, J.
2-19-57	Filed Judgment #61441 as to Joseph Gernie—Sentence—Five Years on counts 2 and 3. Fined $1. on each of counts 2 and 3. Fines remitted. Sentenced—Ten Years on counts 5-6 and 7. Fined $5,000 on count 7. Fine on count 7. to be paid or to stand committed until he is otherwise discharged according to law. Sentences on counts 2-3-5-6 & 7 to run concurrently, but consecutively to sentence defendant is presently serving imposed by Judge Bryan on 10-31-56 for violation of probation on C117-246. at a place of confinement to be designated by the Atty Genl. of the U. S. Remanded. Palmieri, J.
2-19-57	Issued commitments and copies for Edward Ogull, Philip Buzzeo, Joseph Gernie and Michael Edward Mayer.
(C)	
2-21-57	Filed notice of appeal as to deft. Edward Ogull.
2-20-57	Filed notice of appearance by Jacob W. Friedman, 170 Bway NYC as atty for Joseph Gernie.
2-26-57	Filed remands (2) as to Defts. Mayer and Buzzeo dated 2-4-57 Palmieri, J.
2-26-57	Filed Remand as to Deft. Ogull dated 2-11-57. Palmieri, J.

Docket Entries

DATE	PROCEEDINGS
2-26-57	Filed commitments (4) and entered marshal's return. Defts. Edward Ogull, Philip Buzzeo, Joseph Gernie and Michael Edward Mayer delivered to Det. Hdqtrs. NYC—2-19-57 for service of sentence or transfer to another institution by prison van.
2-26-57	Filed Writ of Habeas Corpus ad prosequendum for Joseph Gernie. Writ satisfied 2-19-57. Palmieri, J.
2-27-57	Filed affidavit of John S. Clark, Assist. U. S. Atty., dated 2-25-57 and order dated 2-26-57 for a Writ of Habeas Corpus Ad. Testificandum for Joseph Gernie, to be examined on oath concerning his property. Noonan, J. Iss Writ. Ret. 3-1-57.
2-27-57	Filed affidavit of John S. Clark, Assist. U. S. Atty., dated 2-25-57 and order dated 2-26-57 for a Writ of Habeas Corpus Ad. Testificandum for Philip Buzzeo, to be examined on oath concerning his property. Noonan J. Iss Writ. Ret. 3-1-57.
2-27-57	Filed notice of appeal to US CA by deft. Joseph Gernie.
2-28-57	Filed Opinion #23297 by Judge Palmieri dated 2-11-57 Re: Submitting special questions to the Jury.
3-1-57	Philip Buzzeo and Joseph Gernie—Both sworn in supplementary proceeding. Bicks, J.

Docket Entries

DATE	PROCEEDINGS
3- 4-57	Filed Writ of habeas corpus ad testificandum for Philip Buzzeo, and entered Marshal's return dated 3-1-57. Writ Satisfied 3-1-57. Bicks, J.
3- 6-57	Filed Writ of Habeas Corpus ad prosequendum for Joseph Gernie and entered Marshal's return dated 3-1-57.
3-18-57	Mary Gernie, a 3rd party sworn in supplementary proceedings in USA v. Joseph Gernie. Murphy, J.
3-18-57	Marion Quinn, a 3rd party sworn in supplementary proceedings in USA v. Philip Buzzeo. Murphy, J.
3-28-57	Filed Transcript of record of proceedings, Feb. 4-5-6-7-8-11 and 19, 1957.

A TRUE COPY

HERBERT A. CHARLSON, Clerk

By RAOUL BRUGO
Deputy Clerk

(Court Seal)

Indictment

(622) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Indictment No. C151—135

[SAME TITLE]

The Grand Jury charges.

1. On or about the 14th day of April, 1956 in the Southern District of New York,

EDWARD OGULL and PHILIP BUZZEO

the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug; to wit,

approximately 8 ounces 273 grains of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code)

Indictment

(623) SECOND COUNT

The Grand Jury further charges:

On or about the 4th day of June, 1956 in the Southern District of New York

EDWARD OGULL, PHILIP BUZZEO, JOSEPH GERNIE and MICHAEL EDWARD MAYER

the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit,

approximately 8 ounces 211 grains of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code).

(624) THIRD COUNT

The Grand Jury further charges:

On or about the 12th day of July, 1956 in the Southern District of New York

EDWARD OGULL, PHILIP BUZZEO and JOSEPH GERNIE

the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit,

approximately 8 ounces 235 grains of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code).

(625) FOURTH COUNT

The Grand Jury further charges:

On or about the 2nd day of August, 1956 in the Southern District of New York

MICHAEL EDWARD MAYER and JOSEPH GERNIE

the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit

approximately 1 ounce of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code)

Indictment

(626) FIFTH COUNT

The Grand Jury further charges:

On or about the 6th day of August, 1956 in the Southern District of New York

MICHAEL EDWARD MAYER and JOSEPH GERNIE

the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit,

approximately 2 ounces 215 grains of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code).

(627) SIXTH COUNT

The Grand Jury further charges:

On or about the 18th day of September, 1956 in the Southern District of New York,

MICHAEL EDWARD MAYER and JOSEPH GERNIE

the defendants, unlawfully, wilfully and knowingly did receive, possess, conceal and facilitate the transportation and concealment of a narcotic drug; to wit,

approximately 57 ounces 340 grains of heroin

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics may find necessary to provide for medical and legitimate uses only, is prohibited. (Sections 173 and 174, Title 21, United States Code).

(628) SEVENTH COUNT

The Grand Jury further charges:

1. On or about the 1st day of April, 1956 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

EDWARD OGULL, PHILIP BUZZEO, JOSEPH GERNIE and MICHAEL EDWARD MAYER

the defendants, and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate the United States Code, Title 26, Sections 4704(a), 4701, 4703, 4724(c) and 4771(a), and Title 21, Sections 173 and 174.

2. It was part of the said conspiracy that the said defendants unlawfully, wilfully and knowingly would sell, dispense and distribute a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in that the said narcotic drugs would not be in the original stamped package or from the original stamped package, that is to say, that there would not be affixed to the container in and from which the said defendants would

sell, dispense and distribute the narcotic drugs as aforesaid any United States Internal Revenue Stamps as required by Section 4703 of Title 26, United States Code in violation of Sections 4701, 4703, 4704(a), and 4771(a) of Title 26, United States Code.

(629) 3. It was further a part of said conspiracy that the said defendants, being persons who had not registered and who had not paid the special tax provided for by Sections 4702(a), 4721 and 4722 of Title 26, United States Code, unlawfully, wilfully, and knowingly would have in their possession and under their control a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in violation of Section 4724(c) of Title 26, United States Code.

4. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, sell and facilitate the transportation, concealment and sale of the aforesaid narcotic drugs, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

OVERT ACT

1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 13th day of April, 1956, in the Southern District of New York, Edward Ogull and Philip Buzzeo, defendants, were at the premises designated as 360 12th Avenue, in the City of New York.

2. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 14th day of April, 1956, Philip Buzzeo, a defendant, delivered approximately

one quarter kilogram of heroin to a man on West End Avenue in the City of New York.

(630) 3. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 20th day of April, 1956, in the Southern District of New York, EDWARD OGULL, a defendant, was at the premises designated as 304 West 40th Street, in the City of New York.

4. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 3rd day of June, 1956, in the Southern District of New York, EDWARD OGULL, a defendant, was at the premises designated as 360 12th Avenue, in the City of New York.

5. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 3rd day of June, 1956, in the Southern District of New York, PHILIP BUZZEO, a defendant, was at the premises designated as 101 West 66th Street, in the City of New York.

6. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 4th day of June, 1956, in the Southern District of New York, PHILIP BUZZEO and JOSEPH GERNIE, defendants, were at the premises designated as the Lighthouse Cafe at 76th Street and Broadway in the City of New York.

7. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 4th day of June, 1956, in the Southern District of New York, JOSEPH GERNIE and MICHAEL EDWARD MAYER, defendants, were at the premises described as the Devonshire Garage on 76th Street in the City of New York.

8. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 4th day of June, 1956, in the Southern District of New York, PHILIP BUZZEO, a defendant, delivered approximately one quarter kilogram

of heroin to a man on Amsterdam Avenue in the City of New York.

(631) 9. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 12th day of June, 1956, in the Southern District of New York, EDWARD OGULL and PHILIP BUZZEO, defendants, were at the premises designated as 360 12th Avenue in the City of New York.

10. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 11th day of July, 1956, in the Southern District of New York, EDWARD OGULL, a defendant, engaged in a telephone conversation.

11. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 11th day of July, 1956, in the Southern District of New York, PHILIP BUZZEO, a defendant, was at the premises designated as 101 West 66th Street in the City of New York.

12. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 12th day of July, 1956, in the Southern District of New York, PHILIP BUZZEO and JOSEPH GERNIE, defendants, were at the premises designated as the Lighthouse Cafe at 76th Street and Broadway in the City of New York.

13. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 12th day of July, 1956, in the Southern District of New York, PHILIP BUZZEO and JOSEPH GERNIE, defendants, were at premises described as the Devonshire Garage on 76th Street in the City of New York.

14. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 12th day of July, 1956, in the Southern District of New York, PHILIP BUZZEO a defendant, delivered approximately one-quarter kilo of heroin to a man on 76th Street in the City of New York.

15. In further pursuance of said conspiracy and to effect the objects thereof, on or about the 2nd day of August, 1956, in the Southern District of New York, MICHAEL EDWARD MAYER, a defendant, was at the premises described as the West 67th Street Garage, in the City of New York.

(632) 16. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 6th day of August, 1956, in the Southern District of New York, JOSEPH GERNIE and MICHAEL EDWARD MAYER, defendants, were together at the premises described as the West 67th Street Garage, in the City of New York.

17. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 18th day of September, 1956, in the Southern District of New York, MICHAEL EDWARD MAYER, a defendant, was at the premises described as 307 West 68th Street, in the City of New York.

(Title 18, United States Code, §371; Title 21, United States Code, §174; Title 26, United States Code, §7237.)

JOHN G. WINCHESTER
Foreman

PAUL W. WILLIAMS
United States Attorney

Excerpts from Testimony

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(7) Mr. Frankel: If it please your Honor, as a witness in the case I am informed there is one Maxwell Berner, a so-called special employee of the United States Government, in this case. By special employee I mean a person who is not formally an agent of the Narcotics Bureau but one whom they employed and who is paid by the Government for services in the case. I believe the testimony will show that in the beginning of this case he met my client, it led to certain conversations, which led to a narcotic's agent, who will (8) be a witness in this case and Mr. Berner participated in many of those conversations and meetings.

I don't know whether the Government will have Mr. Berner here or whether the Government will call Mr. Berner as a witness. I therefore ask your Honor to ask the Government to have Mr. Berner here for me so that I might speak with him, because if the Government does not call him as a witness, and I feel the Government should, I might have to.

However, I have been trying to find Mr. Berner. I have been unable to locate him, though I have known Mr. Berner for many years. After I have searched I have not been able to find him. I am asking your Honor to ask the Government to produce him so I might speak with him.

The Court: I take it from what you say that Mr. Berner was an irregular employee of the Government and not continually employed by the Bureau.

Mr. Frankel: My investigation has shown Mr. Berner was employed not only on this matter but involved in other matters in separate cases in this court, charged with the possession and sale of narcotics.

The Court: I take it you don't know what the nature of his employment is.

Colloquy

(9) Mr. Frankel: I know he is a special employee. I described earlier, Judge, he was one whom they used—I don't want to use the word "entrapment" at this moment —but that may come out in my defense—whom they used to get certain people, in order to discover or investigate the sale of narcotics.

The Court: Mr. Londin, is this man available?

Mr. Londin: I don't know Maxwell Berner. I have never met him, I have never known him by name or in person. To the best of my knowledge he is not available. We can't produce him.

The Court: I take it you don't intend to use him.

Mr. Londin: I do not.

The Court: I would appreciate it if you communicate with the agent in charge of this case in order to ascertain his whereabouts, and if he can be made available, please see that that is done. If he can't, please advise me and the attorney as quickly as possible.

Mr. Frankel: May I make a further request?

In view of the fact that I am told that Mr. Berner is not to be used by the Government, I now feel that it is a very unfair method of prosecuting in this (10) case because Berner, the evidence will show, was a Government agent or employee in this case, who participated in all of the conversations and, as such, he should be produced here by the Government and not force the defense to attempt to produce him, since he is their paid agent, to make out a case here as against any one or as against these defendants.

The Court: I know nothing about the facts of the case and I am certainly not in a position to give any instructions to the assistant United States attorney as to how he has to prove his case. That is entirely up to him.

As the evidence proceeds, you can make such motions and requests as you think you are justified in making.

* * * * *

Ivan Wurms—for Government—Direct

(25) IVAN WURMS, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Londin:

Q. Mr. Wurms, what is your occupation? A. Agent with the Federal Bureau of Narcotics.

Q. How long have you been an agent? A. A year and a half.

Q. What was your occupation before that? A. I was a detective for the Metropolitan Police Department, Washington, D. C.

Q. Have you ever used a name other than Ivan Wurms? A. I have.

Q. What name was that? I. Ike Wasserman.

Q. When did you use that name? (26) A. When I began my undercover work here in New York.

Q. When was that? A. It started January of 1956.

Q. Do you know a person named Edward Ogull? A. I do, sir.

Q. Do you see him here in court? A. I do.

Q. Will you point him out, please. A. The gentleman with the glasses, seated behind Mr. Kove.

Mr. Londin: May the record indicate the witness identified the defendant Ogull?

The Court: Yes.

Q. When did you first meet the defendant. Edward Ogull? A. April 13, 1956.

Q. Where on April 13, 1956 did you meet him? A. King's Diner, 360 Twelfth Avenue, New York City.

Q. Mr. Wurms, about what time of day was that? A. 2:30 p.m.

Q. Was he introduced to you as Edward Ogull at the

time? (27) A. No, sir. He was introduced as Eddie Brandeis.

Q. Did he answer to that name? A. Yes.

Q. How were you introduced to him? A. As Ike Wasserman.

Q. Who introduced you? A. Special Employee Max Berner.

Mr. Frankel: What is the name?
The Court: Repeat it, please.
The Witness: Max Berner.

Q. What did you say to Ogull and what did he say to you? A. We had a general conversation concerning Mr. Ogull's work on the pier, that he was a foreman on a pier where he assisted in the loading and unloading of ships. This particular day he worked on another pier.

Q. Did he make a phone call after that general discussion?

Mr. Frankel: May I object to that as leading.
May I have the entire conversation if he were asked as to a conversation and not to lead?

Q. What happened after he told of his employment? A. He excused himself and said he has to make a (28) phone call.

Q. What happened after that? A. The special employee left the table where I was sitting and joined Mr. Ogull and they left the diner and entered a 1950 Buick parked outside the diner. About 3:05 p.m., Phil Buzzeo entered the diner and took a seat at the north portion of the diner at the counter.

A few minutes later Ogull and the special employee reentered the diner and approached me and Ogull told me we had better go outside we could talk better outside.

I joined Ogull and the special employee and when we left the diner Ogull told the special employee and myself to enter the car.

Ogull then reentered the diner and joined Buzzeo and they were engaged in conversation. About five minutes later they came outside and stood in front of the diner.

Q. Who? A. Ogull and Buzzeo.

Q. What happened after that? A. A few minutes later Ogull came over to the car and told the special employee to get out of the car and he joined Ogull and Buzzeo.

(29) A few minutes later the special employee and Buzzeo entered the car and Buzzeo was introduced to me as Bob, and I was introduced as Ike Wasserman.

At that time the special employee left the car and rejoined Ogull in front of the diner.

Q. Did you and Buzzeo have a conversation? A. We did.

Q. What did Buzzeo say to you and what did you say to him?

Mr. Kove: I appreciate the difficulty but at this point I object to any conversation as not binding on Gernie.

The Court: Do you represent this conversation will be related to the defendant Gernie?

Mr. Londin: Yes.

The Court: I will take it subject to connection.

Mr. Frankel: I make the same objection.

The Court: The same ruling.

Q. What did he say to you? A. Buzzeo said, "I understand you wanted some."

I said, "But I want to settle the quality and the price first."

He told me that the stuff that he could deliver would be 90 percent for sure but he was telling me 90 (30) percent because it was really 95 percent.

I looked at him and said, "Who are you kidding?"

He said, "It is true, and Eddie said you would be satisfied with 85, and I knew I could satisfy you."

Q. You said you used the word "Stuff." Does that word "stuff" have a special significance in the narcotics traffic, if you know? A. It does.

Q. What is that meaning? A. Heroin.

Q. Then did you have any further discussions with Buzzeo? A. I did at that time. I told him I wanted a quarter kilo and we discussed the price and Buzzeo agreed to sell me a quarter kilo for $2,750.

Q. How much is a quarter kilo? A. Approximately 8 ounces, 8¾ ounces.

Q. Then he asked for what, $2,750, did you say? A. That's right.

Q. What did you say? A. I agreed to it.

Q. Did he say anything about anything else, about narcotics, other than the price, after he mentioned (31) that to you? A. Just that the stuff he could get was right off the ship. At that time I tried to get a sample.

Q. What did he say? A. He said that he could give me a sampl which would be pure, and on the initial delivery he could give me some stuff that wasn't heroin at all.

I finally agreed to it and purchased a quarter kilo. With that, arrangements were made. I asked Buzzeo where I should meet him for the deal and he said Lowry's Bar at 465 Fourth Avenue at eight o'clock that evening.

Q. Did he discuss—he said the stuff was pure; is that it? A. He said it was going to be pure, that he could deliver.

* * * * *

(57) Q. What did Buzzeo say? A. He suggested I wait. I told him that I had this other commitment, I had to move stuff out, I couldn't wait. He said, "Wait a minute. I have to make a phone call."

Ivan Wurms—for Government—Direct

He called me over to the phone booth. "The (58) best they can do is 12:30. Can you wait?"

I said, "No."

He again spoke and said, "How about 9:30 Monday?"

I said, "That will be fine."

A short time later I left.

Q. Did you in fact come back at 9:30 next Monday? A. I did.

Q. What day was that, do you recall? A. June 4th.

Q. You got to the Ship Ahoy Bar at what time? A. About 9:30 p.m.

Q. Did you meet anyone you knew? A. Phil Buzzeo.

Q. What happened? A. We had a general conversation. I asked him how soon I could leave. He said we would have to go somewhere else and pick it up but I should be on my way by 10 or 10:15. I said that would be fine.

We left a short time later and walked—

Q. Did you say anything to Buzzeo about the price at this time, if you recall? A. I believe I asked if he could do better on the price, but he refused.

(59) Q. Was there any discussion about price that you can recall dealing with this quantity or any other quantity? A. I believe I told him that I spoke to some people, that I could pick up a kilo for between $7,000 and $8,000.

Q. What did he say to that? A. He said "You probably could, but when you test the stuff the quality wouldn't be as good as mine and you will come running back to me."

Q. Did he quote you a price on a full kilo? A. I asked what he was selling it for and he said $11,500. I said that was a little stiff. He said, "The quality would be what you had the last time and you would be more than satisfied."

Q. What happened after this? A. We left the Ship Ahoy and walked west on 66th Street and entered the 1955 Chevrolet, New York registration CW4491.

Q. The same one you had been in before? A. Yes, sir;

that was parked by the Marie Antoinette Hotel, 66th Street and Broadway.

Q. Where did you drive to? A. We went down west on 66th Street to Amsterdam Avenue, north on Amsterdam to 73rd Street, west on 73rd (60) Street to Broadway, north on Broadway to 76th Street and parked in front of the Beacon Garage, 210 West 76th Street.

Q. Is that anywhere near the Devonshire Garage? A. It is right across the street.

Q. What happened then? A. Buzzeo asked me if I had the money. I said yes, and asked if he had the stuff. He said no.

Q. What time was this, about what time? A. About 9:55 p.m.

Q. What did Buzzeo say after he said he didn't have the stuff? A. He said he had to pick it up, he would be back in about ten minutes, twenty minutes.

Q. Did he tell you where you should wait until he came along? A. He said, "Wait right in the car here."

Q. What did you say to Buzzeo? A. I was a little reluctant to give the money. He said, "You don't have to worry. I will leave the car."

With that I handed Phil Buzzeo $3,000 official Government advance funds, the numbers of which had been previously recorded.

* * * * *

(75) *By Mr. Londin*:

Q. You just testified, Agent Wurms, that on July 12th you returned to the Dolphin Cafe about 9 o'clock. A. Yes, sir.

Q. What happened there? A. I entered the Dolphin Cafe and met Phil Buzzeo.

Q. Did he have anything to say? A. Buzzeo told me that the weather didn't look too good.

Q. What did you say to that? A. I said, "What do you mean?"

He said, "You know what I mean. There is a little heat on. It might not go through tonight."

I said, "Don't hang me up again. I have had certain commitments and I have to leave town."

(76) He said, "Wait a minute. I will make a phone call."

He made a call and came back and said, "Everything looks all right. We will have to leave here about 10:30."

We had a general conversation and at that time I told Buzzeo, "I hear a lot of people call you Phil. Is that your name?"

He said, yes. I then asked him how soon I would be on my way. He said, "You should be on your way shortly after 10:30."

Q. Did he have anything to say about another quantity or just the quarter kilo? A. I don't recall.

Q. What happened after this general conversation that you had? A. About 10:30 we left the Dolphin Cafe, walked north on Broadway and entered the 1955 Chevrolet again. We proceeded south on Broadway and made a U-turn and then headed north on Broadway.

Q. Where did you drive? A. Broadway to—

Q. Where did you end up? A. We ended up by the Devonshire Garage. We (77) parked a little east of the office.

Q. Was anything said during the drive? A. Yes. He said he was going to get it from the same people, that I had nothing to worry about, but there might be a little change, I would have to pick the stuff up myself.

He asked me for the money and I handed him $2,800 official Government advance funds, the serial numbers previously recorded at the office.

Q. When had you previously recorded the serial numbers, do you recall? A. They were recorded on July 11th.

Mr. Londin: Please mark this as Government's Exhibit 4 for identification.

(Marked Government's Exhibit 4 for identification.)

Q. I show you Government's Exhibit for identification and ask whether you have seen this before. A. I have.

Q. What is Government's Exhibit 4 for identification? A. This is the list of moneys, the serial numbers which I recorded at the office of the Bureau of Narcotics on July 11, 1956.

Q. What did you do with the money, the serial (78) numbers of which are on Government's Exhibit 4? A. That is the money I handed to Phil Buzzeo on July 12th.

Q. Did you in fact give him everything on this list? A. No.

Q. What did you fail to give him? A. I failed to give him two $50.

Q. And the total of the money was how much? A. $2,800.

Q. The list would have a total of $2,900? A. That's right.

Q. What happened after you gave him the money? A. He said that I would have to wait and that the deal will probably take around twenty minutes.

Q. By the way, do you recall what other agents were present when this list was made up, to the best of your recollection? A. Donald Miller, George O'Connor, Martin Pera.

Q. Do you think there might have been some others around too or are these the only ones you remember? A. Offhand those are the only ones I remember.

Q You said you parked just east of the Devonshire Garage. About what time was that? (79) A. About 10:45, close to 10:45.

Q. What happened? A. Buzzeo alighted from the vehicle. He walked west on 76th Street to Broadway where he met Alphonse Mosca.

Q. He met some other man? A. Yes, sir.

Q. Do you know the name of this other man? A. Yes.

Q. What is that? A. Alphonse Mosca.

Q. What happened then? A. They walked north on Broadway, disappeared from my view.

Q. What happened next? A. About 10:50 or 10:55 I observed a 1955 two-tone Oldsmobile drive up and enter the garage entrance of the Devonshire Garage. I identified the driver as Joseph Gernie.

Q. The man seated right here? A. With the bowtie, yes.

Mr. Londin: May the record indicate the witness identified the defendant Gernie?

The Court: Yes.

(80) A. Joseph Gernie parked the car in the garage. He came out and proceeded to walk west on 76th Street and when he approached the side door of the Lighthouse Cafe, Phil Buzzeo came out of the cafe, they shook hands and both entered the side door of the Lighthouse Cafe.

Q. You said the side door. Will you describe the layout of the Lighthouse Cafe to the jury so they can understand this. A. It is located on the northeast corner of 76th Street and Broadway. The front entrance is on Broadway and it extends all the way down to the Devonshire Garage, and there is a side entrance which is closer to the Devonshire Garage.

Q. On what street is that side entrance? A. 76th Street.

Q. You saw Gernie and Buzzeo go into the Lighthouse Cafe. What happened after that? When was the next time you saw either Buzzeo or Gernie? A. I believe close to 11 o'clock. Buzzeo came out of the Lighthouse Cafe and was followed by Gernie.

Q. You say followed by. How close was Gernie to him? A. About four feet behind him when they were walking.

(81) Q. Buzzeo was walking ahead and Gernie was behind him? A. That's right.

Q. What happened then? A. Buzzeo entered the car entrance of the garage and Gernie walked through the car entrance into the garage office.

A short time later Buzzeo came out through the garage office and entered the car. He took a brown paper bag from under his sportshirt between his waistband and belt and handed it to me.

Q. You say Buzzeo went into the garage and Gernie went in after him before that? Buzzeo went in the car entrance and went to the garage office.

Q. Buzzeo, shortly after that, came out and rejoined you? A. After he went to the garage office he passed Gernie, and Buzzeo came out and entered the car.

Q. He then took a package from the waistband of his trousers? A. That's right.

Q. Were did you go after that? A. We proceeded east on 76th Street to Amsterdam (82) Avenue and north on Amsterdam to 77th Street and at 77th Street and Broadway I alighted from the vehicle and returned to the office of the Bureau of Narcotics.

Q. Did you inspect the package you got from Buzzeo? A. Yes, sir.

Q. Can you describe it? A. It was a double sandwich bag inside a brown paper bag.

Q. What was in the double sandwich bag? A. White powder.

Q. What did you do with the package and the contents? A. I surrendered the evidence to Agent Donald Miller.

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Ivan Wurms—for Government—Cross

(89) *Cross Examination by Mr. Frankel*:

* * * * *

(92) Q. Did you learn from Max Berner how he came to go into that business? Just tell us yes or no. A. Which business?

Mr. Londin: I object to that as irrelevant.

The Court: Sustained. You are asking about the hat frame business?

Mr. Frankel: Yes.

The Court: I sustain the objection on the ground that it is irrelevant and remote.

Q. Did Max Berner discuss the hat frame business with you?

Mr. Londin: Objection, your Honor. The same objection, irrelevant.

Mr. Frankel: I am trying to lead up to certain conversations.

The Court: You are opening the door. I put (93) you on notice by opening up the door to conversations between this agent and Berner, you afford the prosecutor a subsequent opportunity to explore the conversations.

Mr. Frankel: I will withdraw the question and get it another way.

Q. Do you know whether Max Berner has a criminal record? A. He has, Mr. Frankel.

Q. You say he has a record? A. He has.

Q. When you met him you knew what his record was, did you not? A. At that time, no.

Q. Since that time you have learned, have you not? A. Yes, sir.

Q. Do you know how many convictions if any Max Berner had?

Mr. Londin: Objection. He is not on trial. He is not a witness.

The Court: Sustained. His credibility is not an issue here.

* * * * *

(95) Q. Do you know if he had just come out of jail at that time?

Mr. Londin: Objection.

The Court: Sustained.

Mr. Frankel: Exception.

* * * * *

(102) Q. Did you meet him from time to time at the Bureau office or near the Bureau office? A. Yes, I met him from time to time.

Q. How did you arrange to contact him?

Mr. Londin: I must object to all this line of testimony on the ground it is not an issue. The conspiracy started sometime in April 1956. None of these meetings and conversations have been shown to have any relevance at all.

The Court: I will sustain the objection.

* * * * *

(148) ANTHONY ZIRILLI, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Londin:

* * * * *

(151) Q. Do you know Joseph Gernie? A. Yes, sir.

Q. Do you see him here in court? A. That is the gentleman at the end there (indicating).

Mr. Londin: May the record indicate the witness identified the defendant Gernie?

The Court: Yes.

Q. When did you see Gernie? A. On August—

Q. The first time you recall seeing him. A. August 6th.

Q. Where was that? A. I saw him at the intersection of Columbus Avenue and 67th Street.

Q. About what time was that? A. About 9 p.m.

Q. To the best of your recollection. A. About 9 p.m., I believe. Buzzeo parked his (152) automobile—

Q. First of all, we are on Gernie. You saw him about 9 o'clock. What was he doing? August 6th was it? A. August 6th.

Q. What did he do? A. He drove up in his automobile—wait a minute—I believe it was later than that. That was closer to 10 o'clock.

Q. About 10. What did Gernie do? A. He parked an automobile on 67th Street at Columbus and he left his automobile, walked east on the south side of 67th Street and opened the door to a Pontiac, a green Pontiac, parked near 67th Street Garage.

Q. Did you ever see this Pontiac before? A. Yes, I did.

Q. Where? A. It had been driven by one Michael Mayer, I believe his name was.

Q. What did Gernie do when he got to the Pontiac? A. He opened the door and as I passed him I saw a dark package in his hand and he threw it in the Pontiac. Then he shut the door and continued walking and walked to the 67th Street Garage, into the office.

I turned around and starting walking east on (153) the south side of 67th Street. I saw him meet with Mayer, after which Mayer left the 67th Street Garage and entered the Pontiac and he left.

Q. About 10 o'clock you saw Gernie drive up in a car? A. Yes, sir.

Q. What car? A. A 1955 two-tone green Oldsmobile.

Q. What happened after you saw Mayer drive off after he came out of the garage? A. I waited a few minutes and I saw a 1949 Plymouth double-park just east of the 67th Street Garage and Edwards, a man whom I later identified as Edwards, left this automobile and walked to the 67th Street Garage.

Q. What happened there? A. I saw him meet with Joseph Gernie.

Q. Who met with Gernie, was it Edwards? A. Yes, sir, I believe it was Edwards.

Q. Who else did you see around this time? A. There was the driver of the car—there were two colored fellows, one was Edwards and the other one was Benjamin Harell.

Q. Where was Edwards and where was Harell? (154) A. I believe it was Harell—Edwards was driving the car and Harell left the automobile and walked into the 67th Street Garage.

Q. What did Harell do in the garage? A. All I saw him was meet—come together with Mr. Gernie.

Q. Harell and Gernie met in the garage? A. In the office of the garage.

Q. What happened after that? A. Two or three minutes later Harell came out and got into the automobile and they drove out of the area. We fellowed them to 102nd Street.

Q. With whom did you follow? A. Agent O'Connor and I and some other agents followed this automobile to 102nd Street and East River Drive, where we stopped the automobile and—

Q. What did you do then? A. We searched the—then we saw another man, Harold Mobie, I believe his name was, meet Edwards and Harell. We arrested the three and I searched Harell and found 3 ounces of heroin—I found three envelopes containing—

Q. What were they like? A. Three double glassine envelopes containing some (155) white powder.

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(160) MARTIN PERA, called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Londin:

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(161) Q. When did you first see Buzzeo? A. On June 4, 1956.

Q. About what time was that? A. About 5:30 in the afternoon.

Q. Where was this? A. In the vicinity of 69th Street and West End.

Q. For how long did you continue to watch him after that? A. Well, off and on for a period of several months.

Q. But on this particular day. A. On this particular day I continued watching him for several hours in the afternoon and subsequently that night.

Q. About 9:30 do you recall seeing Buzzeo go anywhere with any of the agents? A. Yes, I do.

Q. Will you tell the Court and jury about that. A. About 9:30 p.m. that day I saw Buzzeo with Agent Ivan Wurms at the Ship Ahoy Bar, which is located at 66th Street and Amsterdam Avenue.

They were sitting at the bar until about 9:45 (162) that night, at which time they went out, and Agent Wurms accompanied Buzzeo to Buzzeo's car, which was parked at 66th Street just west of Broadway by the Marie Antoinette Hotel.

Q. What sort of car was it? A. A 1955 Chevrolet sedan, a blue automobile, license number CW4491, to the best of my recollection.

Agent Wurms entered the automobile with Buzzeo, Buzzeo drove then to the Lighthouse Cafe, which is lo-

cated at 67th Street and Broadway. Buzzeo drove up east on 67th Street and parked the car on the south side of 76th Street, just west of Amsterdam Avenue.

Q. What happened then? A. Buzzeo left the automobile and walked into the Lighthouse Cafe.

I followed him and entered about the same time he did. He entered the Lighthouse Cafe from the side entrance and I entered from the front entrance. Buzzeo seated himself at the bar and ordered a drink. I went to the bar and continued observing.

Buzzeo then went to the telephone booth and made a call. There is a public booth inside the bar.

He went back to his place at the bar and about five minutes later a man I subsequently learned and now (163) know as Joseph Gernie—

Q. Do you see that man? A. Yes.

Q. What did he do? A. He arrived and joined Buzzeo at the bar.

Q. Do you see this other man who joined Buzzeo here in court? A. Yes.

Q. Will you please point to him. A. The man at the end of the table there (indicating).

Mr. Londin: May the record indicate the witness has identified the defendant Joseph Gernie?

The Court: Yes.

Q. Then Gernie joined Buzzeo at the bar after the phone call and then what happened? A. They had a conversation that lasted several minutes. Then Gernie went.

Q. When Gernie came in was anything said that you could hear? A. Yes, the bartender, as Gernie approached the bar, said "Hello, Joe," and Gernie acknowledged the greeting.

Q. What happened then? A. After Buzzeo and Gernie met at the bar they (164) had another drink or so and

then Gernie went to the telephone booth and made a telephone call.

Q. What did Gernie do after the call? A. Rejoined Buzzeo, and after they talked for a minute or two, he motioned to Buzzeo to follow him and the two went down the stairs to the basement, which I later learned led to the washrooms of the Lighthouse Cafe.

They were down there about, I would say—well, within five minutes they reappeared. They came up. Then Gernie walked over to the bar, but Gernie left Buzzeo and walked towards the window on the 67th Street side of the Lighthouse Cafe and looked out the window, which has a view of 67th Street and the corner of Broadway.

He stayed there about five minutes or so and Buzzeo remained seated at the bar during that time. After about five minutes, Gernie left his place at the window abruptly and walked back to Buzzeo. They had another conversation and then Gernie left the Lighthouse Cafe by the side entrance.

Q. What did you do? A. I followed him out of the front entrance almost immediately after he left.

(165) Q. To where did you follow him? A. I followed him—I observed him walking east on 76th Street on the north side of the street to the Devonshire Garage. He walked into the garage and I observed him in the office of the garage.

Then I observed him come out with another man I subsequently learned was named Michael Mayer. The two came out, and Mayer went into a 1956, I believe, Oldsmobile, green and white, that bore license number, I believe it is, 7C6735, to the best of my recollection.

Mayer went into this automobile and drove off. He proceeded east on 67th Street, then turned north on Amsterdam Avenue after which he was lost from view. I watched Gernie return to the Lighthouse Cafe and I entered the Lighthouse. After a few moments Gernie and

Buzzeo came out. It is my recollection that Gernie walked behind Buzzeo. Buzzeo walked into the Devonshire Garage, then into the office.

Q. Was he walking with Gernie at this time? A. Gernie was following behind him.

Q. About how close behind? A. Very close. I would say within several yards.

Q. I see. A. Buzzeo walked into the garage.

(166) Q. What did Gernie do? A. Gernie sort of carried behind him and walked into the garage and into the garage office and he was out very quickly.

Gernie kept watching Buzzeo after he got out of the garage. Buzzeo returned to his automobile where Agent Wurms had been waiting all this time and as Gernie watched them, Buzzeo drove off in the automobile with Agent Wurms, in a Chevrolet.

Q. What did Gernie do after this, after they left? A. He returned to the Lighthouse.

Q. Right after they drove off? A. Yes, sir.

Q. Do you recall being in the vicinity of the Lighthouse after that? A. Yes. I was in that vicinity on several occasions after that.

Q. Were you there on July 12th? A. Yes, I was.

Q. About what time was that? A. I was there at about 9 p.m. of that day.

Q. What happened then? A. I was at the Lighthouse Cafe from about 9 p.m. until 9:30.

(167) Q. Then what did you do? A. Then I went to the vicinity of 66th Street and Broadway where at about 10:20 p.m. of that day I saw Agent Wurms and Buzzeo come out of the Dolphin Cafe located on the west side of Broadway, just south of 66th Street.

Q. What did they do? A. Agent Wurms accompanied Buzzeo in the Chevrolet automobile I described previously and which automobile was located about a block or a half block north of the Dolphin Cafe.

Buzzeo drove with Agent Wurms in the automobile to 76th again but this time they parked on the north side of 76th Street, just east of the Devonshire Garage.

Q. What happened then? A. Buzzeo got out of the automobile and walked toward the Lighthouse. He was greeted by a man whom I had seen often in the company of Gernie prior to that time. He went with this man to the Lighthouse Cafe.

Q. What happened after that? A. About 10:50 I saw Gernie drive up in his Oldsmobile that I described previously, which Michael Mayer had driven on previous occasions. I saw Gernie drive up in that automobile and park that car in the (168) Devonshire Garage. He simply put it into the entrance of the garage with the rear of the automobile pointing towards the street.

Q. That was the man you identified before as Joseph Gernie, sitting at that table? A. Yes. He left the car there and walked to the Lighthouse, towards the Lighthouse.

As he approached the Lighthouse, Buzzeo came out of the cafe and shook hands with him in the street and they had a conversation there for a minute or so.

Q. What happened after that? Where did they go? A. They then went into the Lighthouse together. They were in there a short while, when Buzzeo and Gernie came out again.

Buzzeo walked toward the Devonshire Garage, Gernie following behind him again. Buzzeo entered the garage and opened the door to the automobile, to Gernie's automobile which was still in the same position that Gernie left it in.

He opened the door by the driver's seat and entered the automobile for a moment, his foot was outside, he didn't enter all the way, he was sitting partially on the seat. He was there just a moment and then he left the automobile, shut the door and walked out toward the (169) office,

walked through the door that was to the left of the office of the Devonshire Garage.

He was there with Gernie for a moment, then he left the garage through the front office door and rejoined Agent Wurms in the Chevrolet automobile and Buzzeo drove Agent Wurms away from the vicinity again.

Q. This automobile you saw Buzzeo get into briefly was the same automobile, an Oldsmobile, you had seen Gernie driving in before? A. Yes, sir.

Q. At a subsequent date did you arrest Joseph Gernie? A. Yes.

Q. When? A. On September 18th of the same year.

Q. About what time was that and where was that? A. At 10 p.m. we observed Gernie's automobile in the vicinity, just opposite the Devonshire Garage on 76th Street. Then I, accompanied by two other narcotic agents, went into the Lighthouse Cafe where Gernie was seated towards the rear portion of the cafe, where the restaurant is.

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(170) Q. Did you search him? A. Yes, we searched him. He had a wallet, and in that wallet, to the best of my recollection, was a total of $412, some other papers, registration for an automobile, amongst other person effects.

Q. What did you do with the $412? A. I kept it in my custody and took it to the office of the Bureau of Narcotics.

Q. What did you do there? A. Subsequently we compared the serial numbers on each one of the bills. There were two $100s. The numbers on these bills were compared with the numbers of the money that had been used in the purchase of evidence from Philip Buzzeo.

Q. I show you Government's Exhibit 4 for identification. I ask you whether you have seen this before. A. Yes.

Q. What is Government's Exhibit 4 for identification? A. That is a list of the moneys used for the (171) purchase of—

Q. Actually, you yourself do not know about the use of those bills. What did you yourself do with this list? A. At the time it was prepared I observed it being prepared.

Q. When was the next time you saw the list? A. I used this list to compare the serial numbers on the money I seized from Joseph Gernie at the time he was arrested by me.

Q. What were the results of this comparison? A. One of the $100 bills we found on Joseph Gernie at the time we arrested him bore the same serial number and was the same bill used to purchase evidence on July 12, 1956 from Buzzeo.

Q. What did you do with the $412 after that? A. I put it into a lockseal envelope and—

Q. I show you Government's Exhibit 6 for identification. I ask you whether you have seen this before. A. Yes, that is the lockseal envelope that bears my handwriting. This is the envelope in which I placed the money taken from Joseph Gernie at the time he was arrested.

* * * * *

(174) Q. Mr. Pera, on September 18, 1956, did you question Joseph Gernie? A. Yes. Immediately when we placed him under arrest at the Lighthouse, immediately as we came out of the door I asked him where his car was.

Q. Had you previously seen the Oldsmobile you referred to before? A. Yes.

Q. On this day? A. On that date, yes, parked right across the street from the Devonshire Garage.

Q. You asked Gernie about this particular car? A. Yes, I asked him where it was and whether he had a key on his person.

Q. What did he say? (175) A. He said that he didn't have an automobile, he didn't drive a car.

Q. Did you ask him specifically about an Oldsmobile? A. Yes. I asked where the Olds was. He said he didn't

drive a car. He said he had no keys on his person, and he didn't.

Upon searching him he didn't, but he did have a registration to this automobile on his person in somebody else's name, and upon entering the automobile we found the door of the automobile unlocked and the keys up under the sun visor.

Q. Do you have the registration with you? A. Yes, I do.

Mr. Londin: Please mark this for identification.

(Marked Government's Exhibit 8 for identification.)

Q. Mr. Pera, I show you Government's Exhibit 8 for identification. Is that the registration you just referred to? A. Yes, that he had in his wallet at the time we placed him under arrest.

Q. Joseph Gernie? A. Yes.

Q. You went to the automobile and found the keys (176) up in the sun visor? A. Yes.

* * * * *

(181) *Cross Examination by Mr. Kove*:

Q. I believe you told us yesterday on direct examination, and you correct me if I am in error, that the registration which you found in the car, Government's Exhibit 8 in evidence, was taken from the two-tone Oldsmobile that was parked on 76th Street; is that correct? A. No, that is not correct.

Q. You can pick up the facts. A. In my testimony yesterday, what happened, I took that registration from the wallet of Joseph Gernie.

Q. That is the wallet he had in his—the registration in his pocket in his wallet? A. That is correct.

Q. And I think you said yesterday in your testimony—correct me if I am wrong—that the registration (182) as you said was in an assumed name, is that what you meant? A. I said it was made out to the name of Rose Quinn.

Q. Did you make any effort to find out who Rose Quinn was? A. Yes, we had known by that time who she was.

Q. You knew who she was? A. Yes.

Q. Would you tell us, please? A. To the best of my recollection she is related to the wife of Joseph Gernie.

Q. Joseph Gernie's sister-in-law? A. Some relationship.

Q. So far as you know the owner of that car or this registration? A. The registration is made out to her but I never seen her driving the car. The only person I saw was Mr. Gernie.

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(187) Q. Did you find any money at the home? A. Yes, we found—this is my best recollection—there was about $1500 contained in a ladies handbag, and Mrs. Gernie said it was her money.

Q. You took that money, didn't you? A. Yes.

(188) Q. Incidentally, did she tell you where she had gotten that money, or part of it? A. No, she—she first told us it was her money. She subsequently told us it was her husband's money and we could not establish whose money it was. She wouldn't say where it was obtained.

Q. What? A. Where she had obtained it.

Q. Mr. Pera, didn't she tell you part of that money came from her brother who had died? A. I don't recall that.

Q. At any rate, none of that money, none of the bills in that money had any numbers on them corresponding to the list of serial numbers that was outstanding; is that correct? A. None of that money, no.

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Patrick P. O'Carroll—for Government—Direct

(199) PATRICK P. O'CARROLL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

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Direct Examination by Mr. Londin:

(200) Q. On the occasions that you testified, if you did, that you saw what was transpiring in the office, were you able to see through the window? A. When I testified that I saw either Gernie or Buzzeo in there, I was able to see that.

Q. You saw that through the window, did you not? A. Yes.

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(203) Q. Will you tell the Court and jury when you first saw Gernie? (204) A. I first saw him on June 12, approximately June 12, 1956.

Q. When did you see him again after that? A. I saw him again at various periods during the month of June and also in the latter part of July.

Q. Did you see him in August at any time? A. Yes, sir, I did.

Q. What was the first day in August you saw him? A. The first day in August I saw him was on the 2nd day of August.

Q. Where were you at the time? How did you come to see him? A. On August 2nd of 1956 I was in the vicinity of the West End Garage, which is between Columbus Avenue and Central Park East in New York City.

In that vicinity I observed a 1949 Plymouth coupe, a black colored car, drive up and double park outside the garage.

Q. About what time was this? A. About five minutes after ten.

Q. Do you know who was in the car? A. Two colored persons in the car.

Q. Did you learn their names? A. I learned their names at a later date.

(205) Q. What did you learn their names to be? A. I believe one was named Jackson and the other Harell.

Q. Do you know what happened after that? A. After that, this man named Harell got out of the car and walked into the garage. And about three minutes later he walked out of the garage and returned to the car. At that time, I presume that was about ten minutes after ten.

Q. Did you see anyone else at this time? A. Immediately after he walked out of the garage, another person walked out by the name of Michael Mayer.

Q. What happened then? A. He walked to his car, which was a 1952 Pontiac. He got into the car and both cars drove away.

Q. What happened then? A. I was with Agent O'Connor and we followed the 1952 Pontiac which Michael Mayer was driving to 307 West 68th Street.

Q. What happened then? A. At that point Michael Mayer got out of the car and went into the premises of 307 West 69th Street and he was in there, I would say, about ten minutes.

Q. What else did you see in the vicinity of 307 (206) West 68th Street? A. At that time I saw a 1955 Oldsmobile, license plate 736735, which I had previously seen driven by Mr. Gernie, parked about 150 feet way from 307 West 69th Street, down the block.

Q. What happened after that? A. After about ten minutes elapsed, I saw Michael Mayer coming out of the building.

Q. Was anyone with him? A. Two other people with him.

Q. Who were they? A. One person was a man by the name of Alphone Mosca, and the other person was Mr. Gernie.

Patrick P. O'Carroll—for Government—Direct

Q. Do you recall how the defendant Gernie was dressed at that time? A. He was wearing a dark pair of slacks and a checkered sport shirt which was a very small checked sport shirt.

Q. Small checks? A. Yes.

Q. Now what happened after that? You saw them come out of where? A. 307 West 69th Street. They remained in front of the building about a minute or two minutes, (207) talking, or I should say talking but in a sort of loose huddle. Michael Mayer then left and walked to his car and Mr. Mosca walked north to the West End Avenue and Mr. Gernie remained outside the premises of 307. Michael Mayer then drove down the block, it is a block—a dead end street, you have to make a U-turn to come back out again.

Joseph Gernie walked toward the corner when Michael Mayer was going down the block, and proceeded back up. Joseph Gernie walked toward the corner and after Michael Mayer made his right turn Joseph Gernie returned to the premises of 307 West 69th Street.

We then started—I shouldn't say we, I followed Mayer because we proceeded back to the garage at West 67th Street.

Q. Who is the "we"? A. Agent O'Connor.

Q. What did you see there? A. About 10:40 p.m. we observed, or I observed, the person, the colored person Harell walking east on 67th Street and walk into the garage.

Q. Did you see anyone else in the garage at this time other than Harell? A. No, sir, I did not.

(208) Q. What happened after that? A. He was in there for a few minutes and then I observed him walking out of the garage, and at that time he was with Michael Mayer.

They walked about forty or fifty feet toward Central Park West and then they stayed together for a moment and

then they parted, the colored person continuing to Central Park West and Mayer returned to the garage.

Q. That is Harrel you mean went off? A. Yes, sir.

* * * * *

(209) GEORGE J. O'CONNOR, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Londin:

Q. What is your occupation? A. Agent of the United States Treasury Department, Narcotics Bureau.

Q. How long have you been an agent? A. Eighteen years.

Q. Do you know anyone named Philip Buzzeo? A. I do.

Q. When did you first see Buzzeo? A. On June 4, 1956, I had him under surveillance at about 5:30 p.m., from 5:30 to approximately 9:30 in the vicinity of 69th Street and West End Avenue.

At 9:30 I followed him to 66th Street and Broadway and saw him meet Agent Wurms. I then followed Wurms and Buzzeo to 76th Street, between Broadway and Amsterdam Avenue. I saw Buzzeo leave the car and enter the Lighthouse.

Q. What car was this? (210) A. It was a 1955 Chevrolet, CW 4491. Buzzeo left the car and entered the Lighthouse and I saw Agent Pera go in immediately after him. A short time later, about 10:10 p.m., I saw an Oldsmobile drive into 76th Street from Broadway, the license number on the car was 7C6735, and it was driven by a man I knew as Michael Mayer.

Q. What happened after that? A. As Mayer drove the car past the Lighthouse Restaurant, I noticed that Joseph Gernie was looking out the window.

George J. O'Connor—for Government—Direct

Q. Do you see Gernie here? A. I do, sitting with the bow tie on.

Mr. Londin: May the record indicate the witness has pointed to the defendant Joseph Gernie?
The Court: Yes.

Q. You saw Gernie standing at the window looking out? A. I did.

Q. What happened after that? A. Mayer parked the car and Gernie left the Lighthouse and walked to the office of the Devonshire Garage.

Q. How soon after this, the Oldsmobile went by, (211) did Gernie do this? A. As soon as the car passed the window and continued down the street, Gernie disappeared from the window and there was a matter of seconds until he came out the door and continued down the street.

Q. What else did you see? A. I saw both Gernie and Mayer then come out of the office of the Devonshire Garage and I saw Mayer go to his car and saw Gernie walk back toward the Lighthouse Restaurant.

Mayer drove off in the Oldsmobile, 7C6735, and I engaged a taxicab and followed Mayer to the West 76th Street Garage.

Q. What did you see there? A. I saw him double park his car and enter the garage and talk with another man whom I do not know.

Q. When you saw Mayer leave the Lighthouse Bar after the Oldsmobile went by he walked to the garage, you say? A. To the garage office, yes.

Q. Was he alone, was anyone with him? A. He was alone.

Q. Do you know whether anyone was following him out, could you tell? (212) A. No, I don't know.

Q. In August do you recall continuing a surveillance in

the vicinity of this garage? A. Yes, sir. The first surveillance in August was on August 2nd. I had the West 67th Street Garage under surveillance and knew that Michael Mayer was there at the time. I saw a 1949 Plymouth drive into the block and double park outside of the garage.

I saw a man I now know as Ben Harell, leave the car driven by another man I now know as Joseph Edwards, and saw Harell enter the garage office and immediately after that time I saw Mayer leave the garage office and enter his car, a Pontiac, 1950, I believe, 9Z9152, and I followed him to his residence at 307 West 69th Street, where he entered.

Q. What did you see there? A. Shortly before ten-thirty I saw Mayer come out of the house with Joseph Gernie and another man, and they talked for a short time on the sidewalk there and then parted. I then followed Mayer back to the West 76th Street garage.

Q. Did you see any other automobile around there at the time? A. I did.

(213) Q. What was that? A. I saw—

Q. Anyone you particularly remember? A. I saw an automobile that belonged to the other man who came out with Gernie and Mayer. I also saw Gernie's car, 7C6735 that is, parked down in 69th Street west of 307 some distance.

Q. After they came out, what happened, do you recall? A. Mayer got into his car and the other man walked up to the West End Avenue and got into his car and Gernie stood on the sidewalk there and they started to walk up to the corner and turned around and went back to 307.

Q. What? A. West 69th Street.

The Court: Excuse me, the car you are referring to, Mayer's car, was what sort of car?

The Witness: A Pontiac, 9Z9152.

The Court: The car you referred to, 7C6735, was what kind?

The Witness: An Oldsmobile, 1955.

The Court: What color?

The Witness: Two tone green.

(214) The Court: Who was driving that?

The Witness: Mayer drove it on one occasion and that I saw on many occasions Gernie drove it.

The Court: Thank you.

Q. On this particular occasion you saw Mayer drive on in the Pontiac? A. That is right.

Q. This particular Oldsmobile, the two-tone green, 7C— A. 6735.

Q. —was that when Gernie returned to 307 West 69th Street? A. Parked in 68th Street, approximately 150 feet west of 307.

Q. It remained there after Gernie entered the building? A. Yes.

Q. What did you do after that? A. I went back to the vicinity of the West 67th Street Garage and I saw Mayer there standing in front of the garage walking up and down and then I saw Ben Harell approach and enter the garage office and then come out again a short time later with Mayer. They parted.

Q. Were you in the vicinity of the West 67th Street (215) a few days after that? A. Yes. On August 6th, 1956.

Q. About what time was that? A. I got there approximately nine-thirty.

Q. Did you see Gernie there? A. Not at the time I arrived. Mayer was there at that time. But about 9:45 Gernie drove up in 7C6735 and he parked near to Columbus Avenue on the southeast corner of Columbus and 67th Street.

Q. What did Gernie do? A. He walked back toward the West 67th Street Garage in an easterly direction. As he passed Mayer's car, 9Z9152, I saw him open the door of the car and close it again, then entered the garage office.

Benjamin Harell, Jr.—for Government—Direct

Q. From where you stood, could you see what he did when he opened and closed the door? A. No, I couldn't. I saw him open and close the door.

Q. What happened after Gernie entered the garage office? A. Immediately after he entered Mayer came out and entered 9Z9152 and drove to 307 West 69th Street and entered. I then returned to 67th Street and Columbus and picked up Agent Zirilli and followed the— (216) I have gotten ahead of my story, I am sorry.

Q. Just in the order you can recall it happened. A. As Mayer came out and I prepared to follow him away, I noted the same Plymouth which I had seen on August 2nd had arrived, and as I drove past the garage office I could see Gernie inside talking with Ben Harell. Then as I previously stated, I followed Mayer in his car to 307 West 69th Street. Then immediately returned to 67th Street and Columbus and picked up Agent Zirilli, who had the Plymouth under surveillance and followed the Plymouth away.

It was just coming out of the block as I returned. We followed the car to 102nd Street and East River Drive, where we identified ourselves to Harell and Edwards who were in the car and one Albert Mosca, who just approached the car. I witness the search of Harell by Agent Zirilli, and saw him find a package on Harell and find a package on Mobley.

• • • • •

(295) Benjamin Harell, Jr., called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Londin:

• • • • •

(297) Q. I ask you now, Mr. Harell, this heroin you received, that was taken from you when you were arrested during the early part of August, where did you obtain it?

Donald E. Miller—for Government—Direct

A. I would like to take the Fifth Amendment for that question.

* * * * *

(312) DONALD E. MILLER, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Londin:

* * * * *

(314) Q. What happened after that? A. I left the Lighthouse and walked to the center mall on Broadway. At about a little after ten o'clock I saw Joe Gernie looking out the side window of the Lighthouse facing 76th Street. A little after that I saw Michael Mayer driving a 1955 Oldsmobile, license number 7C6742, drive by the Lighthouse and park east of the Devonshire Garage, 207 West 76th Street.

I thereafter saw Joe Gernie come out the side door of the Lighthouse Restaurant and walk down and into the garage. A short time later I saw Gernie walk out of the garage and again walk into the side entrance of the Lighthouse.

A short time after that I saw Phil Buzzeo and Joe Gernie walk out of the side entrance of the Lighthouse and stand on the sidewalk talking for just several seconds. I then saw Phil Buzzeo walk down and into the Devonshire Garage. Meanwhile, I saw Joe Gernie take a walk a short distance in the direction of the (315) Devonshire Garage and stand looking in that direction.

Q. What happened after that? A. A little while later I saw Phil Buzzeo come out of the garage and walk up and enter the 1955 Chevrolet where Agent Wurms was sitting and they drove away.

I then saw Joe Gernie walk back into the Lighthouse Restaurant.

Q. What was Gernie doing when Buzzeo was in and

out of the garage? A. Standing on the sidewalk looking in the direction of the Devonshire Garage.

* * * * *

(318) Q. What happened after that? A. About 10:50 that same evening I saw Joe Gurnie driving a 1955 Oldsmobile, New York license number 7C6742, parking in the Devonshire Garage. I saw him walk back to the Lighthouse Restaurant where he met Buzzeo in front.

Then I saw Buzzeo and Gernie walk into the Lighthouse. A few minutes later, about 10:55, I saw Phil Buzzeo and Gernie walk out the side door of the Lighthouse and walk to the Devonshire Garage.

At the garage I saw Buzzeo walk into the automobile entrance and get in the 1955 Oldsmobile, license number 7C6742.

Q. Are you sure that is the correct license number, (319) Agent Miller? Think carefully. A. 6735 is the correct license.

Q. You were mistaken before when you said 6742? A. Yes, sir.

The Court: Will you describe it by color.

The Witness: It was a green and white two-tone.

The Court: And the year, if you know.

The Witness: 1955, a 98.

The Court: Thank you.

Q. Continue now. You saw Buzzeo get into that car? A. Yes, sir.

Q. Just describe for the Court and jury what happened. A. When I saw him, he had just opened the door and was sitting in the automobile at the time. The door was open and he was sitting on the passenger side of the car. Meanwhile Gernie continued walking into the garage office.

Donald E. Miller—for Government—Direct

Q. What happened after that? A. The next thing I saw was Buzzeo inside the garage office talking to Gernie.

Q. What happened after that? A. Buzzeo then walked to the 1955 Chevrolet where (320) Agent Wurms was waiting and they drove away.

Q. Did you see Agent Wurms later that night? A. Yes, sir, at the office of the Bureau of Narcotics.

Q. What happened then? A. There he showed me a package containing a white powder. I saw him remove six staples from that package and put them on two index cards.

Q. Agent Miller, I show you Government's Exhibit 5-F in evidence and ask whether you have seen these before. A. Yes, sir, these appear to be the staples that Agent Wurms took from the package and placed upon that index card.

Q. I also show you Government's Exhibits 5-C, 5-D and 5-E, all in evidence, and ask whether you have seen them before. Deal first with 5-C and -D and -E. A. 5-C and 5-D were the two bags that I would describe as sandwich bags that Agent Wurms gave to me containing a white powder. 5-E is a lunch sack that Agent Wurms turned over to me that same evening.

Q. Will you look at 5-B in evidence, Mr. Miller. Tell the Court and jury whether you have seen that before. A. First, on that same night, I took the packages (321) containing the white powder from Agent Wurms, placed them in a lockseal envelope and put them in a steel cabinet, locked it and retained the key in my possession.

The next day I removed that package and transferred the white powder from Government's Exhibits 5-D and 5-C and placed it into Government's Exhibit 5-B.

Q. 5-B. What then did you do? A. I then placed Government's Exhibit 5-B into a lockseal envelope.

Q. Look at Government's Exhibit 5 for identification.

please, Mr. Miller, and tell the Court and jury whether you have seen this before. A. Government's Exhibit 5 for identification is the lock-seal envelope into which I placed Government's Exhibit 5-B.

Q. What did you do with 5-B and its contents? A. Then I delivered that to the United States chemist.

Q. Was it locksealed when you delivered it? A. Yes, sir, it was.

Q. When was the next time, Agent Miller, that you saw the defendant Gernie? A. On August 6, 1956.

Q. What happened on August 6th? Where did you (322) see him and at what time? A. About 9:45 I saw him park a 1955 Oldsmobile, license number 7C6735.

Q. That is the two-tone green you referred to before? A. Yes, sir, that is correct. At the intersection of 67th Street and Columbus Avenue. I then saw him get out of the Oldsmobile and walk to a 1952 Pontiac, license number 9Z9142. I saw him open the door of the Pontiac and immediately close it and walk into the 67th Street Garage.

Q. What happened then? A. A short time later I saw Michael Mayer come out of the 67th Street Garage and walk down and get into the Pontiac. As I drove by the 67th Street Garage following Mayer in the Pontiac, I looked in the garage office and saw Gernie talking to Ben Harell.

• • • • •

(461) MICHAEL EDWARD MEYER, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Kove:

• • • • •

(464) Q. Did you ever have any narcotic dealings with Joseph Gernie? A. I did not.

Ivan Wurms—for Government—Rebuttal—Direct
Motion for Mistrial

Q. Did you ever get any narcotics from him? A. No.

Q. Did you ever give him any? A. No, sir.

Q. Did you ever get any narcotics from him? A. No, sir.

(465) Q. Did you ever give him any money in connection with narcotic deals? A. No, sir.

Q. Did you ever indicate to him that you were engaged in the narcotic traffic? A. No, sir.

Q. And were you engaged in the traffic and sales? A. Yes, sir.

Q. Did you ever tell Joseph Gernie about it? A. No, sir.

• • • • •

(510) IVAN WURMS, having been previously sworn, was recalled and testified further in rebuttal as follows:

Direct Examination by Mr. Londin:

• • • • •

(513) Q. Was it on that occasion that you discussed real estate? A. Phil Buzzeo mentioned a piece of property that friend of his had out in California that he had just returned from California and this person wanted to sell it. It was a restaurant and, I believe, in the back they could carry on some gambling games.

Q. Was that the only discussion you had at which Edward Ogull was present in which real estate was discussed or was there any other? A. That is the only occasion that any property was mentioned.

Mr. Londin: Mr. Frankel and Mr. Kove?

Mr. Frankel: In view of the last statement about gambling games, I respectfully move to withdraw a juror and declare a mistrial.

(514) Mr. Londin: That was made only with reference to Philip Buzzeo as I recall.

The Court: I deny the motion.

Mr. Frankel: Exception.

* * * * *

(535) Mr. Kove: If your Honor please, I think perhaps I may be able to take care of the situation in the requests but I have this situation. I have already given your Honor the proposed requests on behalf of the defendant Gernie. Of course, at this time I could not have anticipated the events with respect to the witness Harell. It occurs to me, I did some, shall I say, second thinking last night when I went back to my office and this situation developed: Factually, it would appear as though the Government at least had some intimation that Harell would be to say the least, a reluctant witness. I don't know whether or not he indicated to them that he was going to plead the Fifth Amendment. I asked Mr. Londin and he said he didn't and that, of course, as far as I am (536) concerned, that is sufficient. His word is good with me. It should be. However, it creates this situation. There isn't any question, I believe, that Harell's position on the witness stand, in the light of testimony of one or more of the agents as to his presence at the garage on two occasions, I think together with Gernie, that his taking, getting on the stand and pleading the Fifth Amendment has created an aurora of prejudice against the defendant Gernie.

Whether or not that could be cured by a mere instruction to the jury that they are not to draw any inferences from that, I am not prepared to say. But

I would respectfully suggest that is the minimum amount of caution that can be taken.

The Court: I intend to charge the jury and, of course, I don't want to cut off Mr. Londin, I want him to make whatever statement he wishes to. I had understood from his previous statement that he had no intimation of Harell's claim of immunity under the Fifth Amendment. On the contrary, he had every reason to believe from prior testimony and prior statements given by Harell that he would be a very willing and valuable witness. But I will let him make his own statement if he wishes to make another one at this time.

(537) I intend to charge the jury that Harell's claim of privilege is not evidence against the defendants and that it led to a ruling of law which was a part of my function and that my ruling sustaining his claim of immunity must not be considered to be evidence by them.

• • • • •

(542) Mr. Kove: I respectfully move to strike from the testimony, strike that testimony relating to the money that was taken from the defendant Gernie's pocket and—I don't know the exhibit number—

The Court: 6-A and B.

Mr. Kove: —on the grounds that it is remote (543) from the time when the money allegedly was paid to the defendant Buzzeo.

The Court: Denied.

• • • • •

Excerpts from Court's Charge

(586) Later on, on September 18th—this is over two months later—Gernie is arrested. They searched Gernie and found one of these $100 bills on his person, and that is Government's Exhibit 6-A in this case.

• • • • •

(589) Q. What do you do with witnesses if you find they told wilful falsehoods? The law says that you can either reject everything on the ground that all of the testimony is tainted by that falsehood or that you can accept that which is credible and reject that which is incredible. That is what the law says you can do with respect to witnesses who you believe told a wilful falsehood.

• • • • •

Judgment and Commitment
(U. S. A. v. Edward Ogull)

(644) UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 151-135

UNITED STATES OF AMERICA

v.

EDWARD OGULL

On this 19th day of February, 1957 came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly selling, receiving, concealing and facilitating the transportation, concealment and sale of narcotics; and conspiring to violate the Narcotic Laws of the United States. (Title 21, Secs. 173 and 174; Title 18, Sec. 371; Title 21, Sec. 174; Title 26, Sec. 7237 USC.) as charged in counts 1-2-3 and 7 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE YEARS

on each of counts 1-2-3 and 7 to run concurrently with each other. Fined $1. on each of counts 1-2 and 3. Fines remitted.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Edmund L. Palmieri,
United States District Judge.

A True Copy. Certified this 19th day of February 1957.

Herbert A. Charlson
Clerk

Frank Davis
Deputy Clerk

Judgment and Commitment
(U. S. A. v. Joseph Gernie)

(648) UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 151–135

UNITED STATES OF AMERICA

v.

JOSEPH GERNIE

On this 19th day of February, 1957 came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly selling, receiving, possessing, concealing and facilitating the transportation, concealment and sale of narcotics; and conspiring to violate the Narcotic Laws of the United States. (Title 21, Secs. 173 and 174; Title 18, Sec. 371; Title 21, Sec. 174; Title 26, Sec. 7237 USC.) as charged in counts 2-3-5-6-7 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE YEARS

Judgment and Commitment

(*U. S. A.* v. *Joseph Gernie*)

and fined $1. on each of counts 2 and 3. Fines remitted. TEN YEARS on each of counts 5, 6 and 7. Fined $5000. on count 7, and to stand committed until fine on count 7 is paid or he is otherwise discharged according to law. Prison sentences on counts 2-3-5-6-7 to run concurrently with each other, but to run consecutively to sentence defendant is presently serving imposed by Judge Bryan on Oct. 31, 1956 for violation of probation on indictment C 117-256.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDMUND L. PALMIERI,
United States District Judge.

HERBERT A. CHARLSON,
Clerk.

A True Copy. Certified this 19th day of February 1957.

HERBERT A. CHARLSON
Clerk

FRANK DAVIS
Deputy Clerk

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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

— v —

JOSEPH GERNIE and EDWARD OGULL,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR UNITED STATES AND APPENDIX

PAUL W. WILLIAMS,
United States Attorney for the
Southern District of New York,
Attorney for the United States of America.

JEROME J. LONDIN,
ROBERT B. FISKE, JR.,
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Indictment 4a

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

— v —

JOSEPH GERNIE and EDWARD OGULL,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Statement

This is an appeal from judgments of conviction entered against appellants in the United States District Court for the Southern District of New York, after a trial before Honorable Edmund L. Palmieri, District Judge, and a jury.

The indictment was in seven counts.

Count One charged Ogull and one Buzzeo with the sale of 8 ounces, 273 grains of heroin on April 14, 1956.

Count Two charged Gernie, Ogull, Buzzeo, and one Mayer with the sale of 8 ounces, 211 grains of heroin on June 4, 1956.

Count Three charged Gernie, Ogull, and Buzzeo with the sale of 8 ounces, 235 grains of heroin on July 12, 1956.

Count Four charged Gernie and Mayer with the sale of 1 ounce of heroin on August 2, 1956.

Count Five charged Gernie and Mayer with the sale of 2 ounces, 315 grains of heroin on August 6, 1956.

Count Six charged Gernie and Mayer with the possession of 57 ounces, 340 grains of heroin on September 18, 1956.

Count Seven charged Gernie, Ogull, Buzzeo, and Mayer with conspiring to violate the federal narcotic laws (Gernie App. pp. 7a-15a).

On the day set for trial Buzzeo and Mayer pleaded guilty to all counts of the indictment in which they were named. Buzzeo was sentenced to five years, and a fine of $5,000 was imposed. Mayer was sentenced to five years, six months (Gernie App. pp. 2a, 3a-4a). The case against Gernie and Ogull proceeded to trial.

At the close of the Government's case, Count Four was withdrawn[1] (327).[2]

Gernie did not testify. Ogull took the witness stand and attempted to set forth a defense of entrapment (359). He also claimed he withdrew from the conspiracy prior to the passage of the Jones-Miller Act (Title 21, United States Code (Supp. IV 1957), Section 174, as amended July 18, 1956, 70 Stat. 570) (372-5).

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[1] Page 3a of appellants' appendix erroneously refers to a verdict of guilty against Gernie on Count Four. There is no such docket entry.

[2] All references are to the typewritten transcript of the trial minutes, unless otherwise stated.

On February 11, 1957, after six trial days, the jury found Gernie and Ogull guilty as charged (Gernie App. 2a-3a. But see Footnote 1, *supra*).

Gernie was sentenced to imprisonment for five years on Counts Two and Three and ten years on Counts Five, Six, and Seven, all sentences to run concurrently. In addition, a fine of $5,000 was imposed under Count Seven (Gernie App. p. 4a).

Ogull was sentenced to imprisonment for five years on Counts One, Two, Three, and Seven, all sentences to run concurrently (Gernie App. p. 3a).

Statutes Involved

Title 18, United States Code §371. *Conspiracy to commit offense or to defraud United States.* If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, ch. 645, §1, 62 Stat. 701.)

Title 21, United States Code §173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* It is unlawful to import or bring any narcotic drug into the United States or

any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, ch. 100, §2, 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; June 14, 1930, ch. 488, §3, 46 Stat. 586.)

Title 21, United States Code (1952), (Prior to Amendment of July 18, 1956, 70 Stat. 570) §174. *Same, penalty;*

evidence. Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173 and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556) as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States Attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States Attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or

deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted or if he acknowledges that he is such person, he shall be sentenced as prescribed in this section.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Feb. 9, 1909, ch. 100, §2(c), 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; Nov. 2, 1951, ch. 666, §§1, 5(1), 65 Stat. 767).

Title 21, United States Code (Supp. IV, 1957) (As amended July 18, 1956, 70 Stat. 570) §174. *Same; penalty; evidence.* Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more

than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc. see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, §105, 70 Stat. 570).

Introduction to the Facts

The evidence disclosed the existence of a conspiracy to deal in large quantities of contraband heroin. Approximately eighty-five ounces of heroin were involved in this case alone. There were three large sales of pure heroin, which totalled over 25 ounces, at prices totalling $8,550.00. In addition there was a much smaller sale of 2 ounces, 315 grains of heroin.

Gernie was the source of the heroin. He was assisted by Mayer, his nephew. The drugs and the extensive cutting and packaging paraphernalia required by this large enterprise were kept in Mayer's apartment.

Buzzeo purchased heroin from Gernie. Buzzeo resold this heroin to Wurms, an undercover agent of the Bureau of Narcotics. Arrangements for these re-sales were made by Ogull. Gernie and Mayer also sold heroin to one Harell.

References to the record appear below.

The Facts

On the afternoon of April 13, 1956 a special employe of the Bureau of Narcotics (Berner) introduced an undercover narcotic agent (Wurms) to the appellant Ogull.[3] Ogull telephoned and Buzzeo arrived. Buzzeo was introduced to Wurms. Ogull had told Buzzeo that Wurms wanted heroin of 85% purity. Arrangements were made for the sale that evening of a quarter kilogram of heroin for $2,750. (26-31).

Buzzeo did not make the sale that night, because he was, in his own words, being cautious. (36). The sale was postponed until the next evening. (36-7).

On April 14, 1956 Buzzeo sold 8 ounces, 273 grains of heroin[4] to Wurms for $2,750. Buzzeo instructed Wurms to call Ogull when he wanted more heroin. (37-9, 147).

Wurms met Ogull again on April 20, 1956.[5]

When Wurms complained of the manner of arranging for their heroin transactions, Ogull advised him not to be impatient. Ogull praised the quality of the heroin. He told Wurms that the delay during the first sale, occasioned by Buzzeo's caution, would not be repeated. (45-6).

On April 27, 1956 Wurms again met Ogull. Ogull tried to sell Wurms cocaine at $1,300 an ounce. (47-8). Buzzeo

[3] That was the full extent of Berner's part in this case.

[4] Testimony concerning the weights and analyses of all narcotic exhibits admitted into evidence appears at pages 257-75 of the minutes.

[5] Berner was present, but he did not participate in the ensuing conversation.

had previously tried to sell cocaine to Wurms. (32-3). Wurms had never before discussed cocaine with Ogull. (48). Ogull said he was quoting the price Buzzeo wanted. (48).

Ogull then asked when Wurms would make another purchase of heroin. Wurms was not yet ready to buy again. Ogull too was not ready to do business that night. He told Wurms he would have to telephone Buzzeo and tell him the transaction would not go through. Ogull then made a telephone call. (48-9).

Wurms telephoned Ogull on May 3, 1956. Later that evening they met as arranged. Wurms was ready to do business but Ogull said that Buzzeo was not available. Ogull added that Buzzeo had been waiting to sell heroin to Wurms on the prior occasion.

Ogull said he would get in touch with Buzzeo, and asked whether Wurms, who posed as a non-New Yorker, would be in town. When Wurms said he was leaving, Ogull asked the time of departure. Ogull told Wurms to call him before leaving the next day to see if he had been able to contact Buzzeo. (50-1).

Wurms called Ogull the next day, May 4, 1956, but Ogull had not been able to get Buzzeo. This attempt was repeated on May 7, 10, and 11, 1956, without success. (51-2).

On May 22, 1956 Wurms and Ogull met at the Scarlet Patch Bar, pursuant to their prior telephone conversation. Wurms asked Ogull to introduce him to a new source of supply. Ogull refused, saying, "This isn't Delancey Street." Ogull told Wurms he would have to wait until Buzzeo returned. Ogull tried to persuade Wurms to buy a whole kilogram of heroin, about 35 ounces, next time. (53-4).

Wurms telephoned Ogull on June 1, 1956 and they arranged to meet. Ogull asked Wurms how much heroin he wanted. When Wurms ordered only a quarter kilogram of heroin, Ogull expressed great disappointment. Ogull hoped Wurms would make larger purchases more frequently. Ogull said he had been taken to task for selling Wurms the first quarter kilogram of heroin at too low a price, and that the price for the next quarter kilogram would be a few hundred dollars more than the original price of $2,750. He said it would do Wurms no good to argue about the price. (54-5).

Ogull telephoned Buzzeo and arranged a meeting between Wurms and Buzzeo for later in the day. Wurms met Buzzeo at the time and place specified by Ogull. Wurms ordered a quarter kilogram of heroin, and, as Ogull had said, the price went up. This time it was $3,000. Buzzeo advised Wurms that the quality of the heroin would be the same as before, because it would come from the same source (56). The actual transaction was arranged for June 4, 1956 (58).

On June 4, 1956 at 9:30 p. m. Wurms and Buzzeo met at the Ship Ahoy Bar, 101 West 66th Street (58, 37). Buzzeo said they would have to go elsewhere to get the heroin. Shortly after, they left the Ship Ahoy Bar and walked to Buzzeo's automobile (58-9). They drove to 76th Street and parked across the street from the Devonshire Garage, located on 76th Street, east of Broadway (59-60).[6] Buzzeo did not yet have the heroin. He had

[6] The Lighthouse is on the northeast corner of 76th Street and Broadway. The front entrance is on Broadway. The bar extends toward the Devonshire Garage on 76th Street. There is a side entrance to the Lighthouse on 76th Street, close to the Devonshire Garage (80).

to pick it up. Buzzeo obtained $3,000 from Wurms and left Wurms in the car. It was about 9:55 p. m. Buzzeo went to the Lighthouse Bar, at 76th Street and Broadway where he telephoned (162, 209).

Gernie arrived at the Lighthouse Bar within five minutes and joined Buzzeo. They conversed briefly. Gernie telephoned, and then again spoke to Buzzeo. Gernie stationed himself at a window of the Lighthouse Bar looking out on 76th Street (162-4, 210).

Mayer drove by in an Oldsmobile usually used by Gernie and the registration of which was in Gernie's possession (61, 181-2, 210). Thereupon Gernie abruptly left his observation post at the window, spoke to Buzzeo, and walked over to the Devonshire Garage (164-5, 210-11).

At the Devonshire Garage Gernie met Mayer, after which Mayer drove off in the Oldsmobile (165, 61-2, 211). Gernie then returned to the Lighthouse Bar, where he picked up Buzzeo. Gernie and Buzzeo went to the Devonshire Garage.

Buzzeo emerged from the Devonshire Garage, carefully watched by Gernie. Buzzeo rejoined Wurms in the parked automobile, announcing, "I have the stuff." Buzzeo and Wurms drove off, as Gernie still watched them (166, 62). Buzzeo turned the 8 ounces, 211 grains of heroin over to Wurms (63).[7]

On June 12, 1956 Wurms telephoned Ogull. They met. Wurms complained about the quality, quantity and price of the heroin he purchased on June 4, 1956. Ogull telephoned Buzzeo, who came right over. Ogull, Buzzeo, and

[7] See note 4, *supra*.

Wurms discussed the matter. Buzzeo offered to reduce the next price by $200. Ogull gave Wurms his home telephone number to facilitate the next heroin transaction, which would still be arranged through Ogull (Gov. Ex. 3, 68-72, 429).

Wurms met Buzzeo again on July 11, 1956. The meeting was arranged by Ogull. They discussed another heroin transaction (72-3).

On July 12, 1956 Wurms and Buzzeo met at the Dolphin Cafe, 1975 Broadway, at 9 p. m. (74-5). They left at 10:30 p. m. and again drove to the vicinity of the Devonshire Garage. Buzzeo went to get the heroin from the same source of supply (75-7, 167). Wurms gave Buzzeo $2,800. The serial numbers of the bills had been recorded (77). At about 10:45 p. m. Buzzeo left Wurms and went to the Lighthouse Bar.

Gernie then drove up in the Oldsmobile. He left the Oldsmobile at the Devonshire Garage and walked to the Lighthouse Bar, where he met Buzzeo. They shook hands (79-80, 167-8). Gernie and Buzzeo walked to the Devonshire Garage, with Buzzeo walking ahead and Gernie following four feet behind Buzzeo, the man with whom he had just shaken hands (80-1, 168).

Buzzeo got into the Oldsmobile which Gernie had just left. A moment later he was out of the Oldsmobile. Buzzeo then spoke to Gernie, who was watching through the window of the Devonshire Garage, after which he rejoined Wurms. Buzzeo took 8 ounces, 235 grains of heroin from under his sport shirt, where it was held between his belt and the waistband of his trousers, and gave it to Wurms (81-2, 168-9, 178).[8]

[8] See note 4, *supra*.

On August 2, 1956 a man named Harell visited Mayer. Mayer immediately drove off and went into 307 West 69th Street. Gernie's Oldsmobile was parked in the block. Gernie was in 307 West 69th Street, where Mayer joined him. He came out with Mayer, and, when Mayer drove off to a meeting with Harell, Gernie re-entered 307 West 69th Street (204-8, 212-14).

On August 6, 1956 Gernie drove up to 67th Street and Columbus Avenue, where he parked. Gernie walked over to Mayer's car, a Pontiac, and threw a dark package into it. He then entered the 67th Street Garage, where he met Mayer. Mayer immediately left the 67th Street Garage and drove off in the Pontiac. Mayer drove to and entered 307 West 69th Street (152-3, 159-60, 323).

Gernie was joined in the 67th Street Garage by Harell. They conversed. Harell left in a few minutes and drove off. At 102nd Street and the East River Drive Harell and his companions were arrested. Harell had 2 ounces, 215 grains of heroin[9] (154, 157-8, 216-17, 323).

On August 10, 1956 Ogull telephoned Wurms and offered "to do him some good." Ogull arranged a meeting and invited Buzzeo. When Wurms said he was going to Cuba on a gambling deal, Ogull said, "Are you sure you are not going for something else?" Buzzeo volunteered that he had good connections in Cuba—"for gambling or anything else" (511-13, 515).

Mayer was arrested on September 18, 1956 at 307 West 69th Street. On his person and in his apartment were found 57 ounces, 340 grains of heroin[10] (221-51).

[9] See note 4, *supra*.

[10] See note 4, *supra*.

In his pocket Mayer had two double glassine envelopes, containing 474 grains of heroin and 252 grains of heroin, respectively. From a dresser Mayer produced a leatherette case holding twenty-five double glassine envelopes which contained 22 ounces, 85 grains of heroin. A double brown paper bag in the children's bedroom yielded 17 ounces, 285 grains of pure heroin. Another brown paper bag in the children's bedroom yielded 17 ounces, 285 grains of pure heroin. Another brown paper bag held five double glassine envelopes with 4 ounces, 268 grains of heroin. Yet another brown paper bag was found, containing twelve double glassine envelopes with 12 ounces, 275 grains of heroin. And under his daughter's bed lay a box containing:

Hamilton postal scale
Pelouze Mfg. Co. scale, with five weights and two trays
Speed stapling machine
Acciliner stapling machine
Three boxes of staples
Three large boxes of glassine envelopes
Four and one-half blocks of mannite
One can of milk sugar
Two cans of dextrose
One jar of quinine hydrochloride
Four spoons
Six sieves
One spatula

(292, 495).

The Speed stapling machine (Gov. Ex. 10 U, 227, 292) was the machine which pressed the staples to seal: (1) the quarter kilogram of heroin purchased on July 12, 1956 by Wurms, when Buzzeo got it from Gernie's Oldsmobile

(83-4), and (2) the 2 ounces, 215 grains of heroin seized from Harell on August 6, 1956 after his visit to Gernie (218-20) (290-1).

Gernie was arrested on September 18, 1956 (169). He had in his possession one of the $100 bills Wurms paid over to Buzzeo on July 12, 1956 (Gov. Ex. 6A, 170-4). Gernie denied having anything to do with the Oldsmobile; but he drove it many times, and the registration was then found in his possession (174-5, 213-14).

Ogull was arrested on October 4, 1956. He was confronted with Agent Wurms. Ogull looked at Wurms and said, "I never seen you before in my life" (88-9).

POINT 1

Gernie's role as the source of the heroin was conclusively established by the detailed observations of six agents, his possession of marked money, and his false disclaimer of knowledge of the automobile used in heroin transactions.

Appellant Gernie argues that the Trial Court erred in submitting the case against him to the jury. He contends that the Government introduced no evidence of his guilt. Gernie sees no jury issue at all. This claim can hardly be made with much hope.

The test for the Trial Court to apply in determining what rational inferences of fact a jury may be permitted to draw from the testimony is the same in civil and criminal cases. The standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases. *United States* v. *Masiello*, 235 F. 2d 279, 284-5 (2d

Cir.), *cert. denied sub nom. Stickel* v. *United States*, 352 U. S. 882 (1956); *United States* v. *Castro*, 228 F. 2d 807, 808 (2d Cir.), *cert. denied*, 351 U. S. 940 (1956); *United States* v. *Feinberg*, 140 F. 2d 502, 594 (2d Cir. 1944).

In view of the overwhelming evidence against Gernie, the Trial Court was amply justified in sending the case to the jury, for the Government's evidence was clearly sufficient to justify the conviction "whatever nuances of doctrines are applied."

Six agents testified against Gernie.[11] The totatility of their observations, made from different vantage points and at different times, provided the complete picture of Gernie's crimes. The events to which each agent testified were not unrelated fortuitous circumstances. Each agent testified to a different phase of the events in question. Collectively they furnished a chronological account of the activities of Ogull, Buzzeo, Mayer, Harell, and Gernie during Gernie's heroin transactions.

Added to this was the testimony of Mr. Liota, proving the common source of the heroin seized from Harell, purchased from Buzzeo, and found with Mayer. The markings on the staples taken from the packages seized from Harell and purchased from Buzzeo were identical. The Speed stapling machine from which they were pressed was among the cutting and packaging paraphernalia found with the heroin in Mayer's apartment.

Gernie was found in possession of one of the same $100 bills Agent Wurms gave Buzzeo shortly before Buzzeo met Gernie and returned to Agent Wurms with heroin.

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[11] The record references to the facts referred to in Point 1 appear in The Facts, pages 8-15, *supra*.

His defense did not deny or explain his possession of the bill, which was admitted without objection (173).

Gernie showed his consciousness of guilt when he falsely attempted to disassociate himself from the Oldsmobile. *United States v. Simone*, 205 F. 2d 480, 482-3 (2d Cir. 1953).

The proof against Gernie was uncontradicted and unexplained by the defense, except for four pages of testimony by Mayer. Mayer, a relative of Gernie, had pleaded guilty to the full indictment. He denied any narcotic dealings with Gernie (461-5). However, in summation, Gernie's counsel repudiated Mayer in strong language (554).

On cross-examination Mayer testified that he obtained the narcotics and cutting and packaging paraphernalia from a man named Harry in a bar on Columbus Avenue. Mayer said he did not know Harry's surname or the name or address of the bar (469, 471, 491, 494).

According to Mayer, Harry asked him what he thought about narcotics, to which he replied, "Well, everybody has to make a living their own way as far as I am concerned" (470). Eventually Mayer, prepared to do "anything for money", decided to deliver narcotics for Harry and obtained a carton from him. Mayer did not open the carton for a week. When he finally opened it for a brief second out of curiosity, he saw nothing but a few strainers. Mayer denied having seen the remainder of the heroin cutting and packaging paraphernalia (Gov. Ex. 10, 473, 479-87).

Mayer said he obtained the narcotics found on September 18, 1956 at subsequent meetings with Harry (473-9).

Mayer denied having implicated Gernie after he was arrested (487-8, 491, 497-9, 501, 503). The Devonshire Garage meant nothing to him, and he did not recall meeting Gernie at the West 67th Street Garage (504-5).

In rebuttal, Agent Pera explained how Mayer had implicated Gernie after his arrest. The narcotics in Mayer's apartment belonged to Gernie. Gernie paid Mayer $50 to $100 per week for keeping the heroin and making deliveries (517-21).[12]

The jury could properly consider Mayer's testimony which purported to exculpate Gernie, and conclude that the opposite was true. *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925, 933 (2d Cir.), *cert. denied*, 353 U. S. 984 (1957); *Di Carlo* v. *United States*, 6 F. 2d 364, 367-8 (2d Cir. 1925).

In sum, Gernie's guilt was conclusively established. A rational jury could not have failed to convict.

[12] The jury was carefully and properly instructed as to the probative value of Pera's rebuttal testimony (544-7, 589-90).

POINT 2

The Government's inability to produce a minor informer who was long known to the defense did not entitle Ogull to ask irrelevant or immaterial questions.

Appellant Ogull finds error in the Government's inability to produce at the trial an informer named Maxwell Berner, whose only function was to introduce an undercover agent to Ogull. Ogull contends that Berner's absence entitled him to ask questions at the trial that were irrelevant and immaterial. Berner had nothing to do with the three sales of heroin by Ogull and Buzzeo to Agent Wurms. He participated in but one conversation, that of April 13, 1956 (See p. 8, *supra*).

Upon his arrest on October 4, 1956, Ogull denied ever having seen Agent Wurms (88-9). Naturally, Ogull had not the least desire to have the Government produce Berner, who would give the lie to this exculpatory statement. Surely no defense of entrapment was indicated prior to the trial. Indeed, if Ogull or his trial counsel really wanted to find Berner, they could have done so. They both knew Berner for many years (8, 342, 376).

When the trial began four months later, Ogull for the first time demanded Berner be produced in Court (Gernie App. pp. 2a, 16a-17a). By this time Berner's whereabouts were unknown (101, 143, 147, 9, 103-4).[13]

[13] This sworn testimony appears in the record at pages 101, 143, and 147. Yet appellant's brief at pages 20 and 22 baldly states there was no such testimony.

gations at pages 22-4 of appellant's brief can only lead one to marvel at his total lack of familiarity with the record. Agent Wurms met Berner near the Bureau of Narcotics. He was introduced by Group Leader Amato (90). Agent Wurms knew Berner's business address, which he volunteered on cross-examination (92). Agent Wurms knew Berner's wife's address, which Ogull did not even request (101). Agent Wurms had Berner's last address in Brooklyn, which offer Ogull refused (101).

Ogull next turns to the prosecutor's answer to trial counsel's wholly untrue and unsupported statement that "the Government knows where Berner is," an allegation which flies in the face of the sworn testimony (103-4). In the prosecutor's answer that the record shows no such thing, Ogull sees "carefully chosen language"; and he soars to new heights of hyperbole (Gernie Brief pp. 22-3). Sworn testimony vanishes at the brief writer's touch.

Trial counsel for Ogull felt he had requested Berner's presence when "in the corridor I very casually said to Mr. Londin, 'Are you going to have Max Berner as a Witness?' and he shrugged and smiled and I took it for granted . . ." (104-5). This is but further proof, not that Ogull hoped Berner would testify and wanted to find him, but rather that Ogull feared Berner might testify and made no pre-trial inquiry as to his whereabouts.

POINT 3

The Government had no knowledge that Harell would invoke the Fifth Amendment. Accordingly, there was no error in calling him as a witness. Any prejudice to Gernie was cured by the instructions to the jury.

Appellant Gernie contends that the Government, to his prejudice, called Harell as a witness when it knew he would claim the Fifth Amendment. The record belies this contention.

The Government sought to question Harell only about the transaction of August 6, 1956 (295-7). And at the time he was called, Harell had been indicted, had pleaded guilty, and had received a five year sentence under an indictment charging him with the possession, transportation, etc. of heroin on August 6, 1956, and with a conspiracy also related to that date (298-9).[14] Since Harell had been convicted and sentenced for the very crime concerning which the Government sought to examine him, he no longer had any right to claim the Fifth Amendment on this matter. *United States* v. *Romero*, — F. 2d — (2d Cir. 1957); *United States* v. *Cioffi*, 242 F. 2d 473, 477 (2d Cir. 1957).

Furthermore, Harell had testified against Gernie before the Grand Jury and had given a signed statement implicating Gernie. A transcript of his Grand Jury testimony was marked as Court's Exhibit 2. Gernie's photo-

[14] A copy of the indictment was marked "Court's Exhibit 4" (308; Gov't App. pp. 4a-7a).

graph, referred to therein as a Grand Jury Exhibit, was marked as Court's Exhibit 3. Harell's signed statement was marked as Court's Exhibit 1 (301-3; Gov. App. pp. 1a-3a).

Before calling him as a witness at the trial, the prosecutor spoke to Harell twice. At neither time did Harell indicate he would plead the Fifth Amendment. Harell's only intimation of hostility was his claim that he was improperly advised when he signed a statement and testified before the Grand Jury (540).

In answer to this, the prosecutor reminded Harell of his letters to Judge Ryan, Judge Cashin and a former Assistant United States Attorney. In these unsolicited letters Harell wrote that his cooperation had been given voluntarily, out of a sense of duty, and without expectation of reward (540-1).

Harell replied he was afraid to testify against Gernie. Harell's former attorney, a representative of the Legal Aid Society, confirmed that Harell was so terrified he insisted on pleading guilty and going to jail (541).

The Trial Court agreed that the Government had no intimation of Harell's claim of privilege under the Fifth Amendment (536). And the only indication that Gernie's trial counsel could find that the Government anticipated Harell's plea of the Fifth Amendment was a Government memorandum of law (538). However, this memorandum, prepared as a matter of prudence, concerned only the examination of a hostile witness called by the Government. It did not deal with such witness' plea of the Fifth Amendment. (301-2).

> propriety in the prosecutor's continuing to interrogate the witness.
>
> The whole matter becomes too clear for argument when it is noted that the court twice charged the jury to disregard the whole incident."

And in *United States* v. *Amadio*, 215 F. 2d 605 (7th Cir.), *rev'd on other grounds*, 348 U. S. 892 (1954), a prosecution for violation of the Mann Act, the court found that the Government had called two witnesses to the stand whom it knew intended to invoke the Fifth Amendment, and who subsequently did so. Nonetheless, because of the trial court's charge that the invocation of this plea should not be construed against the defendants in any way, the court held that no prejudice had resulted to the defendant, and the conviction was sustained.

From the above cases, it is clear that even where the Government knows in advance that a witness it plans to call will plead the Fifth Amendment, no reversible error results if the court instructs the jury that no unfavorable inferences against the defendant are to be drawn from the invocation of the privilege. In the case at bar, not only were such instructions given to the jury, but there was no knowledge in advance by the Government that Harell would take the Fifth Amendment. Under these circumstances, there very clearly was no error resulting from the action of the Government in calling Harell.

POINT 4

The Trial Court properly left Ogull's defense of entrapment to the jury.

Appellant Ogull claims that the record establishes his defense of entrapment as a matter of law. He feels it is pointless to refer to any part of the record. Appellant Gernie, who dealt directly with Buzzeo and others, and who had nothing to do with Ogull or Berner, or Agent Wurms, sees himself as the beneficiary of Ogull's felicity. They see no jury issue at all. This claim can hardly be made with much hope. Gernie's claim does not even merit discussion.

Under the defense of entrapment the appellant has the burden to establish a prima facie case: that a Government agent induced him to commit the crimes charged in the indictment. Even then the matter is not at an end. The Government may still make a valid reply to that defense by showing that its agent was not perverting an innocent mind, but was acting on a mind ready and willing without persuasion to commit the criminal offenses charged. The Government sustains this burden of proof on its reply by offering evidence of the appellant's activity of a similar nature, preparation for the particular crime committed, or "ready complaisance." *United States* v. *Sherman*, 200 F. 2d 880 (2nd Cir. 1952); *United States* v. *Sherman*, 240 F. 2d 949 (2nd Cir.), *cert. granted* 353 U. S. 935 (1957); *Sorrells* v. *United States*, 287 U. S. 435 (1932); *United States* v. *White*, 223 F. 2d 674 (2nd Cir.), *cert. denied* 350 U. S. 888 (1955); *Trice* v. *United States*, 211 F. 2d 513 (9th Cir.), *cert. denied*, 348 U. S. 900 (1954).

All this the Trial Court charged, and its instructions to the jury on this issue were unexceptionable and clear (579-83). The issue now is whether there was sufficient evidence to support a finding either that Ogull's prima facie showing of entrapment was not made out, or that the Government's reply to the prima facie showing was valid. If either can be supported by the record, the jury's verdict is dispositive of the issue. *United States* v. *Brandenberg*, 162 F. 2d 980, 981-2 (3rd Cir.), *cert. denied*, 332 U. S. 769 (1947); *United States* v. *Mallah*, 149 F. 2d 219, 222 (2nd Cir.) *cert. denied*, 326 U. S. 724 (1945); *United States* v. *Lindenfeld*, 142 F. 2d 829, 831 (2nd Cir.), *cert. denied* 323 U. S. 761 (1944).

The record contains evidence galore to support a finding that Ogull did not make a prima facie showing of entrapment and that the Government made a valid reply. Indeed, the record supports no other conclusions.

From the outset, the evidence demonstrated that Ogull—far from being an innocent victim enticed against his will into the narcotics trade—was a ready and willing participant and, indeed, on occasion, an aggressive promoter of the illicit enterprise.

Agent Wurms testified that after Ogull had brought Wurms and Buzzeo together for the first sale, on April 13, 1956, Buzzeo told Wurms that if he wanted any more heroin, he should contact Ogull (39). On April 27, two weeks later, Wurms saw Ogull again, and on this occasion Ogull asked Wurms if Wurms wanted any cocaine, telling him that he and Buzzeo had five "pieces" (47-8). Agent Wurms declined because the price which Ogull said Buzzeo had told him to ask was too high (48). Ogull asked him when he would be ready to "go another one" (49).

About a month later, on May 22, Wurms asked Ogull to introduce him to some other source of supply besides Buzzeo and Ogull replied "no, this isn't Delancey Street" (53). At this same time, Ogull asked Wurms why he didn't pick up "a whole one" the next time (53). When, on June 1, Wurms told him it would still have to be a quarter of a kilo, Ogull was "disappointed" because he thought the arrangement was that Wurms would pick up a quarter kilo or better more frequently (54).

About three weeks later, on June 12, Ogull gave to Wurms his home phone number where he could be reached after work (71), and about a month after that, on July 12, Ogull arranged a third sale between Buzzeo and Wurms (77 *et seq.*). Finally, on August 10, 1956, Ogull telephoned Wurms, stating that he had heard that Wurms was leaving town and that he wanted to talk to Wurms. He stated that possibly he could "do him some good" before he left. At Ogull's insistence, Wurms met him, and unsolicited by Wurms, Ogull brought his heroin-peddling friend Buzzeo along. Ogull told Wurms that he understood Wurms was going to Cuba, and wanted to know what he was going there for. When Wurms told him it was a gambling deal, Ogull said "are you sure you are not going for something else" and Buzzeo volunteered that he had good connections down there for gambling "or anything else" (511-513).[15]

Certainly this evidence belies the impression of an innocent man lured into crime by agents of the government. And the Trial Court so held (335).

---

[15] This testimony of Agent Wurms with respect to this transaction directly contradicted that of Ogull, who claimed that he had withdrawn from the business in the beginning of July (374) and that he had no discussions with Agent Wurms after July 12, 1956 (397).

In an effort to establish his case of entrapment, Ogull claimed that he had been induced to arrange for the sales by Buzzeo to Wurms by special employee Max Berner. He claimed that he agreed to obtain narcotics for Wurms, as a friend of Berner's, only after Berner had told him that Berner might have someone who might help him financially in a real estate deal which Ogull professedly was contemplating going into with Buzzeo (361-2).

On cross-examination, however, Ogull confessed that during 1956 he "never gave * * * a thought" to how Buzzeo earned his livelihood, and stated only that he thought he worked in a bar (440-1). Furthermore, Wurms testified that Ogull did not inquire of him as to his occupation, or in any way mention to him any real estate, or restaurant business (112-4).

In his direct testimony, Ogull claimed that prior to the April 13, 1956 meeting, he had not told Buzzeo anything about the fact that narcotics were involved (364). On cross-examination, however, he admitted that he had told Buzzeo prior to the meeting that "it wasn't just a real estate deal" and that narcotics were involved (390)—a story which seems the more plausible in the light of Buzzeo's furtive conduct when first entering the bar on that date (407-8), and Buzzeo's request that he be introduced as "Bob", although Ogull had known him as "Phillip" (390). Furthermore, Ogull conceded that at the time Berner first approached him, the term "junk" was known to him as a "common phrase" (381).

The evidence demonstrates that Ogull dealt with Wurms on a regular basis from April 13, 1956 until at least August 10, 1956—a four month period—during which three

sales of narcotics were effected. Nowhere in this period was there forthcoming from Berner any evidence of compliance with his part of the bargain. Yet Ogull went ahead with his end of the deal. The only explanation offered by Ogull for his continuation of this unilateral arrangement was that he felt "I wasn't going out of my way too much and could do them a favor"—hardly a convincing story from a man who, by his own admission was fully aware of the risks he was running by his acts (447).

The issue for the jury was clear. As stated by the Trial Court, it was whether they believed Wurms or Ogull (583). On the evidence, as outlined above, there can be no question but that the jury's decision to believe Agent Wurms was completely justified.

POINT 5

Ogull's motion for a mistrial because of testimony relating to a gambling enterprise of Buzzeo's was properly denied.

Appellant Ogull alleges error in the denial of his motion for a mistrial based on the following testimony of Agent Wurms with respect to a conversation between Wurms, Ogull and Buzzeo on August 10, 1956:

> "Q. Was it on that occasion that you discussed real estate? A. Phil Buzzeo mentioned a piece of property that a friend of his had out in California that he had just returned from California and this person wanted to sell it. It was a restaurant and, I believe, in the back they could carry on some gambling games" (513).

Ogull claims that this testimony indicated that Ogull was contemplating opening a gambling house in California. He then further claims that gambling is a crime in California, and, therefore, that he was prejudiced in the eyes of the jury by proof of unrelated crimes.

Upon examination of the record, however, it is clear that this statement—dealing with a matter which Ogull had opened up in his direct case (360 *et seq.*)—refers only to Buzzeo, and not to Ogull. Accordingly, there is no basis for any claim of prejudice to Ogull on this point.

Furthermore, even if this statement could be construed to extend to Ogull, the reference to gambling was far too remote to in any way justify an inference that Ogull was contemplating entering the gambling business. Any error that may have been committed was clearly "harmless" within the meaning of Rule 52, Federal Rules of Criminal Procedure.

POINT 6

The Trial Court did not err in refusing to strike testimony that Gernie had in his possession a marked bill more than two months after it had been paid over to Buzzeo.

Appellant Gernie claims error in the refusal of the Trial Court to strike testimony—originally admitted without objection (170-1)—that at the time of his arrest on September 18, 1956, Gernie had in his possession a marked $100 bill used by a narcotics agent to purchase narcotics from Buzzeo on July 12, 1956. This objection, we submit, is patently without merit.

The testimony as to Gernie's unexplained possession of the marked $100 bill used in the July 12, 1956 sale by Buzzeo to Agent Wurms was clearly relevant to the question of Gernie's connection with that sale and with the conspiracy. As stated in *Lee* v. *United States*, 245 F. 2d 322, 325 (9th Cir. 1957), a case cited at page 35 of appellant's brief:

> "It was proper for the government to produce evidence in its case-in-chief to the effect that the money found in appellant's possession was part of the advance funds an agent had given Hung. This, along with the other circumstances, tended to prove that there had been a contact between appellant and Hung, or Hung's associate Fong, between the time Hung received the money from the agent and the time Hung delivered narcotics to the agent. It also gave rise to a permissible inference that, on the occasion of that contact, appellant had delivered some article, or rendered some service, to Hung or Fong."[16]

The fact that such possession was found two months after the sale does not destroy the relevancy of the evidence; at best, it goes only to its weight. As stated by this Court in *United States* v. *Boehm*, 271 Fed. 454, 457 (2d Cir. 1921), in affirming a conviction based largely on possession of stolen goods some four months after the actual theft:

> "What may be deemed to be recent possession is a question of fact for the jury. * * * The presumption

[16] The language from this case relied on by appellant refers to a marked bill found in defendant's possession over two years prior to the dates of the crimes charged in the indictment. As such, the court found, evidence of the possession of this bill was prejudicial under the doctrine forbidding evidence of prior misconduct.

> of guilt flowing from such possession grows weaker as the time of possession recedes from the time of the original taking. The fact itself is one for the consideration of the jury under all the circumstances. * * * The lapse of time from the theft of the property until the tires were found in the constructive possession of the plaintiff in error, we think, does not deprive such possession of the property of its probative effect, as a fact from which an inference of guilt of the plaintiff in error could be drawn by the jury."

See also *United States* v. *DiCarlo*, 64 F. 2d 15 (2d Cir. 1933) (Dyer Act conviction upheld partly on basis of proof that defendant had been found in possession of car stolen three months previously).

The cases cited by appellant, other than the *Lee* case, all deal with situations where there was absolutely no connection between the money found in defendant's possession and the crime with which he was charged. Here, by virtue of the fact that the bill found in Gernie's possession had been used in the purchase of narcotics from Buzzeo on July 12, 1956, such a connection was clearly established.

POINT 7

The Trial Court correctly charged the jury as to the rule *falsus in uno, falsus in omnibus.*

The court instructed the jury with respect to witnesses who tell wilful falsehoods as follows:

> "What do you do with witnesses if you find they told wilful falsehoods? The law says that you can either reject everything on the ground that all of the testimony is tainted by that falsehood or that you can accept that which is credible and reject that which is incredible. That is what the law says you can do with respect to witnesses who you believe told a wilful falsehood" (589).

No exception was taken to this charge at the time of the trial. Accordingly, we submit, none can be taken now. Rule 30, Federal Rules of Criminal Procedure; *United States* v. *Cioffi*, 242 F. 2d 473, 476 (2d Cir. 1957); *United States* v. *Sherman*, 171 F. 2d 619, 624 (2d Cir. 1948).

Furthermore, even if an objection at this point is proper, the Federal cases hold very clearly that the doctrine of *falsus in uno, falsus in omnibus*, may be properly invoked whether or not the lies relate to a "material fact". See *United States* v. *Rutkin*, 189 F. 2d 431, 439 (3d Cir. 1951), *aff'd* 343 U. S. 130, *rehearing denied* 343 U. S. 952 (1952); *Virginia Ry. Co.* v. *Armentrout*, 166 F. 2d 400, 405-6 (4th Cir. 1948) (and cases cited therein.)

Professor Wigmore agrees with the Federal authorities, stating in Section 1014 of his treatise:

> "It is commonly said that the falsehood must be

upon a *material* point. No doubt the Courts have here been led away by the inapt analogy of the limitations upon the criminal law of prejury. In the nature of character, a person who would lie upon a collateral point is perhaps likely to be a more determined liar than one who dares it only upon a material point; at any rate, there is no less a call to distrust the former than the latter" (3 Wigmore on Evidence (3d Ed. 1940)).

Accordingly, we submit, the Trial Court's charge on this point was entirely correct.

Conclusion

Appellants' guilt was established by substantial evidence. No error was committed in the curtailing of the cross-examination regarding Berner; nor was error committed in calling Harell as a witness. The evidence negatived any suggestion of entrapment. Ogull's motion for a mistrial was properly denied. Evidence of Gernie's possession of the marked $100 bill was properly admitted, and the jury correctly instructed. Accordingly the judgment of conviction should be affirmed.

Respectfully submitted,

PAUL W. WILLIAMS,
United States Attorney for the
Southern District of New York,
Attorney for the United States of America.

JEROME J. LONDIN,
ROBERT B. FISKE, JR.,
Assistant United States Attorneys,
Of Counsel.

APPENDIX

Statement of Benjamin Harrell

Statement of Benjamin Harrell, Jr., taken on August 7, 1956, at the office of the Bureau of Narcotics, 90 Church Street, NYC, in the presence of Narcotic Agents George O'Connor, Anthony Zirilli, Don Miller and Jacques Changeux.

I, Benjamin Harrell, Jr., furnish the following statement of my own free will. I have not been threatened or promised any immunity. I have been advised that I may have counsel and do not have to give this statement.

On August 6, 1956, I rode in an automobile with Joseph Edwards to 67th Street between Central Park West and Columbus Ave., New York, New York. I got out of the car and walked into the office of a parking garage. I think it was the West 67th Street Garage. Joseph Edwards remained in the car at all times while in this area. When I entered the garage I saw "Joe" and a colored fellow. "Joe" walked into a doorway at the back of the office and I followed him through the door. "Joe" closed the door behind me, then reached over to a coat or sweater hanging on the wall. "Joe" then handed me three cellophane bags and said, "here, I'll see you tomorrow night". I said, o. k., see you tomarrow night. I then went into the toilet in the back of the garage and wrapped the three bags in toilet paper. I then returned to the car with Joseph Edwards and we drove to 102nd St. and East River Drive. Just as we left the car, we were stopped

by the officers. The officers also stopped Albert Mobley who had just walked up to the car. Mobley and I had made previous arrangements that if I were able to obtain any heroin, we were to get rid of it togeather. We were planning to sell it, but we were also planning to use any thing we could not sell.

I first met "Joe" about one week before my brother died on July 27, 1956. At that time, my brother, Douglas, drove me up the West 67th Street Garage. My brother walked into the garage. Shortly thereafter, "Joe" walked out of the garage and looked me over. "Joe" then said, "You Porkie's brother", to which I replied, "yes". "Joe" walked back into the garage. My brother returned to the car and we returned to 99th and Third Ave., where I left the car. Later on that night I received a small amount of heroin from my brother.

On August 2nd, 1956, I rode with Joseph Edwards to the 67th Street Garage. I left the car, walked into the garage and asked for "Joe". I was told by a garage attendant that he was not around. I then returned to the car and we drove around for about a half hour. We then returned to the garage on 67th St., and saw a young lighthaired fellow standing in the office. He said to me, "are you Porkie's brother?", to which I replied "yes". He then walked through the doorway in the back, and motioned for me to follow. He then closed the door and reached over to a coat or sweater hanging on the wall. He then handed me one cellophane bag, and said, "see you tomorrow night—be careful". I then returned to the car and drove back uptown.

Statement of Beniamin Harrell

I do not know "Joe's" last name, and I do not know any name of the lighthaired fellow. Joe is about 30-35 years old, about 5'11" to 6'1" in height, weighs between 180 to 185 lbs., black hair and wavy, smart dresser, no hat. The other fellow is about 23-26 years old, about 5'7"-5'8" in height, weights about 150 lbs., he has light hair and straight. "Joe" is probably Italian, but the other fellow looks more Irish than anything.

I have read the foregoing statement consisting of one (1) page, initialed errors and signed below in the presence of the above officers.

DONALD E. MILLER

BEN HARRELL

Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No.

UNITED STATES OF AMERICA,

—v—

BENJAMIN HARRELL, JR. and JOSEPH EDWARDS,

Defendants.

The Grand Jury charges:

On or about the 6th day of August, 1956 in the Southern District of New York, Benjamin Harrell, Jr. and Joseph Edwards the defendants, unlawfully, wilfully and knowingly did receive, possess, conceal and facilitate the transportation and concealment of a narcotic drug; to wit, approximately 2½ ounces of heroin after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics may find necessary to provide for medical and legitimate uses only, is prohibited (Sections 173 and 174, Title 21, United States Code).

Jury unknown, in that the said narcotic drugs would not be in the original stamped package or from the original stamped package, that is to say, that there would not be affixed to the container in and from which the said defendants would sell, dispense and distribute the narcotic drugs as aforesaid and United States Internal Revenue Stamps as required by Section 4703 of Title 26, United States Code in violation of Sections 4701, 4703, 4704(a), and 4771(a) of Title 26, United States Code.

3. It was further a part of said conspiracy that the said defendants, being persons who had not registered and who had not paid the special tax provided for by Sections 4702(a), 4721 and 4722 of Title 26, United States Code, unlawfully, wilfully, and knowingly would have in their possession and under their control a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in violation of Section 4724(c) of Title 26, United States Code.

4. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, sell and facilitate the transportation, concealment and sale of the aforesaid narcotic drugs, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

OVERT ACT

1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 2nd day of August, 1956, in the Southern District of New York, Joseph Edwards operated an automobile.

2. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 2nd day of August, 1956, in the Southern District of New York, Benjamin Harrell, Jr. rode in an automobile.

3. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 6th day of August, 1956, in the Southern District of New York, Benjamin Harrell, Jr. and Joseph Edwards rode in an automobile.

4. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 6th day of August, 1956, in the Southern District of New York, Benjamin Harrell, Jr. and Joseph Edwards were in the vicinity of 67th Street and Columbus Avenue, New York, N. Y.

5. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 6th day of August, 1956, in the Southern District of New York, Benjamin Harrell, Jr. received approximately 2½ ounces of heroin. (Title 18, United States Code, Section 371.)

.....

Foreman

PAUL W. WILLIAMS
United States Attorney

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IN THE

Supreme Court of the United States

October Term, 1957

No. 914

JOSEPH GERNIE and EDWARD OGULL,
Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB W. FRIEDMAN,
Attorney for Petitioners,
170 Broadway,
New York 38, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1957

No.

JOSEPH GERNIE and EDWARD OGULL,

Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come Joseph Gernie and Edward Ogull, by their attorney, Jacob W. Friedman, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York, which Court imposed a prison sentence on each of the petitioners.

Opinions Below

The opinion of the Court of Appeals is not yet reported, and a copy is hereto appended. There was no opinion by the District Judge.

Jurisdiction

The judgment of the Court of Appeals was entered on February 13, 1958. A motion was duly made in that Court for rehearing, and denied on March 12, 1958.

The jurisdiction of this Court is invoked under: 18 U. S. C. 2(a); 21 U. S. C. 173, 174; 18 U. S. C. 371; 26 U. S. C. 2553(a); 26 U. S. C. 2554(a); Federal Rules of Criminal Procedure, Rule 17c.

Questions Presented

1. Whether this record presents any evidence whatsoever that petitioner Joseph Gernie committed a crime or that he conspired so to do. Whether the trial Court erred in denying his motions to dismiss and in permitting the jury to pass upon his guilt on the basis of mere suspicion. Whether the standard of evidence necessary to send a case to the jury in a criminal prosecution is, as contended by the Government, the same as in a civil action. Whether the Second Circuit rule so declaring is a proper one although admittedly in conflict with the law as enunciated in other Federal Circuits, including the Third, Fifth, Seventh, Eighth, Ninth, Tenth and the District of Columbia.

2. Whether the curtailment of cross-examination regarding one Berner, a paid Government informer in this and other cases, coupled with the Government's failure to produce him or to account for his absence, was not in contravention of this Court's recent holding in *Roviaro* v. *United States*, 353 U. S. 53, 1 L. Ed. 2d 639

3. Whether it was not improper and prejudicial to petitioners for the Government to place on the stand a witness who it had reason to believe would, and actually did, in the presence of the jury, invoke the Fifth Amendment.

4. Whether it was not error to deny the defense motion to dismiss on the ground that entrapment of petitioner Edward Ogull was established.

5. Whether it was not error to refuse a mistrial after the reception of incompetent and unresponsive testimony that petitioner Edward Ogull planned to engage in the operation of a gambling house in violation of the California Penal Code.

6. Whether it was not error to deny a motion to strike incompetent and prejudicial testimony that petitioner Joseph Gernie at the time of his arrest had in his possession a certain marked bill more than two months after it had been paid to another person for narcotics by a Government agent.

7. Whether in charging on the credibility of witnesses found to have testified falsely in one respect, the trial Court did not err in omitting the necessary qualifications that the testimony involved had to relate to material facts.

8. Whether in any event the cumulative effect of the errors urged was not such as to deprive petitioners of a fair trial.

Statutes Involved

TITLE 18, UNITED STATES CODE

§ 371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, ch. 645, § 1, 62 Stat. 701.)

TITLE 21, UNITED STATES CODE

§ 173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is

summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, ch. 100, § 2, 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, § 1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; June 14, 1930, ch. 488, § 3, 46 Stat. 586.)

TITLE 21, UNITED STATES CODE (1952), (PRIOR TO AMENDMENT OF JULY 18, 1956, 70 STAT. 570)

§ 174. *Same; penalty; evidence.*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173

and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556) as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States Attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States Attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this section.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Feb. 9, 1909, ch. 100, § 2(c), 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, § 1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; Nov. 2, 1951, ch. § 666, §§ 1, 5(1), 65 Stat. 767.)

TITLE 21, UNITED STATES CODE (SUPP. IV, 1957) (AS AMENDED JULY 18, 1956, 70 STAT. 570)

§ 174. *Same; penalty; evidence.*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such nar-

cotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc. see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570.)

Statement

Petitioners appealed in the first instance from a judgment of the United States District Court for the Southern District of New York rendered February 19, 1957, convicting them of certain alleged violations of the narcotic laws (21 U. S. C. 173, 174) and conspiracy (18 U. S. C. 371), after trial before Palmieri, D. J., and a jury. Two other defendants indicted with them (Buzzeo and Mayer) had pleaded guilty. The indictment contained seven counts, the fourth of which was withdrawn. Of the remaining six counts, four charged that defendants "wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug"; one, against petitioner Gernie and defendant Mayer, included a charge

of possession; and the last charged conspiracy continuing down to October 19, 1956—although petitioner Gernie was arrested on September 18 and petitioner Ogull on October 4.

Petitioner Gernie was sentenced to 10 years' imprisonment and fined $5,000; petitioner Ogull was sentenced to 5 years' imprisonment.

The facts will be discussed in connection with the respective questions to be argued.

Reasons for Granting Writ

The argument has consistently been made by petitioners below, and they reiterate it in this Court, that they are innocent—Gernie by reason of having no connection with or participation in the offenses charged; and Ogull by virtue of having been entrapped by Government agents and not otherwise. Petitioners recognize that this is not the forum for the presentation of questions of fact. However, the facts necessary to sustain a conviction are absent as to one petitioner (so much so as to render grossly erroneous the submission of the issue to the jury), while as to the other the facts are such as to necessitate his exoneration. In any event their innocence is certainly not a factor which should detract from the validity of the arguments they advance in any appellate tribunal.

Quite apart from the foregoing, the opinion of the Court of Appeals presents several questions of law, upon which the determination reached is in conflict with controlling opinions of the Supreme Court of the United States. The rulings of the Trial Court, heretofore sustained on appeal, constitute prejudicial and reversible error. In some instances, as will be demonstrated, the holding of the Court of Appeals is at variance with the holdings of other Federal Courts of Appeals on the same matters. This diversity of opinion in different circuits relates to important questions of Federal law which should be settled by this Court.

In view of the requirements of the rules that the questions presented for review be expressed without unnecessary detail, an attempt will be made to set forth these matters as concisely as is consistent with the necessities of the case.

Numerical references will relate to pages of the minutes of trial, appended so far as pertinent to the brief in the Court of Appeals.

ARGUMENT

Question No. 1

Whether this record presents any evidence whatsoever that petitioner Joseph Gernie committed a crime or that he conspired so to do. Whether the Trial Court erred in denying his motions to dismiss and in permitting the jury to pass upon his guilt on the basis of mere suspicion. Whether the standard of evidence necessary to send a case to the jury in a criminal prosecution is, as contended by the Government, the same as in a civil action. Whether the Second Circuit Rule so declaring is a proper one although admittedly in conflict with the law as enunciated in other federal circuits, including the Third, Fifth, Seventh, Eighth, Ninth, Tenth and the District of Columbia.

In this, as in the other questions, we do not propose herein to reiterate all arguments adduced in support of our contention that are contained in our briefs in the Court of Appeals. Attention, however, is directed to those arguments, which are valid for all purposes of this petition. We shall confine ourselves to certain additional observations, believing them to be most pertinent in justifying a further review.

At the outset, it cannot be gainsaid that the innocence of an accused is the fundamental question in any judicial inquiry as to the validity of a conviction. At no stage herein has any appellate tribunal been asked to substitute its opinion for that of the jury. We do contend that the evidence against petitioner Gernie did not measure up to the minimum standard required to justify its submission to the jury.

Nor do we limit the Court to our own review of the evidence. The case's determination may be made upon an inspection of the record, or the Government's analysis of the evidence or, indeed, the summary contained in the opinion of the Court of Appeals (notwithstanding several inaccuracies in the recital). The evidence against Gernie consisted of nothing more than a series of meetings, conversations (contents undisclosed) and innocuous activities. They were wholly unexplained and co-extensive in time with but a minute portion of the offenses charged. They were so utterly consistent with innocence as to constitute no warrant for permitting a jury to speculate on an issue tending towards the deprivation of liberty.

The Government itself advanced the theory, and adhered thereto, that the circumstantial evidence against petitioner Gernie was sufficient, while the Court of Appeals (p. 665) declared that it found an abundance of "evidence both direct and substantial" to support the verdict. This language was employed with respect to four defendants, and surely it may not be regarded as referring to petitioner Gernie. In any event the Government could not properly deviate from its original theory. See 24 C. J. S. 674, and cases cited. The extraordinary attitude of the Court of Appeals is exemplified by the observation of Learned Hand, Circ. J., on the oral argument to the effect that if this were a civil action rather than a criminal prosecution, the direction of a verdict would have been required. Unless this remark is interpreted as the direction of a verdict of acquittal, we must respectfully take issue with it.

As we attempted to urge in our reply brief below, pursuing the analogy of a civil action, we assumed that all of the evidence in the record had been presented in a civil action against petitioner Gernie for breach of warranty of quality of narcotics lawfully purchased and sold. We made the assumption that in addition to the proof in the record there was also adequate evidence that the heroin did not answer the description. On such proof, if petitioner Gernie were sought to be held civilly liable for damages sustained, any trial court would unhesitatingly dismiss at the close of the buyer's case because of the complete failure to show that petitioner Gernie was connected with the transaction as vendor of the merchandise or in any other imaginable capacity. Therefore, since the explicit theory of prosecution (Government brief below, p. 7) was that petitioner Gernie was the seller and source of the heroin, the application of the parallel rule as to *prima facie* case in civil actions does not aid the Government in the slightest degree.

The long line of authority refusing to sustain convictions upon insufficient evidence need not be detailed at this juncture. We shall merely mention two recent instances of the application of the rule. In *Handford* v. *United States* (C. A. 5) 249 F. 2d 295 (advance sheets of January 6, 1958), Wisdom, Circ. J., wrote:

> "Mere knowledge of the commission of the crime by another does not prove guilt. Nor does mere presence at the scene. Possession must be proved by some showing of dominion and guilt."

In citing the foregoing case, we do not for a moment concede that there was any proof showing petitioner Gernie's knowledge. And, in *United States* v. *Safur* (C. A. 7), 251 F. 2d 30, Major, Circ. J., wrote:

> "A conviction upon insufficient proof, even in the absence of a motion for acquittal, would amount to a manifest miscarriage of justice."

Of course, herein the matter was duly protected by appropriate motions.

It is important to note that the District Judge recognized a difference between Second Circuit law and that prevailing elsewhere, for, when the defendants cited *United States* v. *Yeoman-Henderson* (C. A. 7) 193 F. 2d 867, the Judge said (R. 336-337):

> "* * * I want to say with respect to the rule of reasonable doubt as a matter of law, you are aware, since you brought this out, this Second Circuit does not subscribe to the opinion in some of the other circuits * * * I do not have the privilege of disagreeing with the Second Circuit."

In the Court of Appeals the Government urged (brief, p. 15) that the standard of evidence requisite to send a case to the jury was the same in both civil and criminal cases, citing the Second Circuit holdings in *United States* v. *Masiello*, 235 F. 2d 279, and *United States* v. *Castro*, 228 F. 2d 807. In the latter case, however, the late Circuit Judge Frank stated that different views were apparently entertained in other circuits, including the Third, Fifth, Eighth, Ninth, Tenth and the District of Columbia. To these we add the Fifth (see *Vick* v. *United States*, 216 F. 2d 228). Thus it may fairly be said that in seven other circuits a contrary view of the law is taken. Such a divergence in the law of the different circuits presents a classic case for the exercise of jurisdiction by the Supreme Court of the United States. The vast number of criminal prosecutions, as attested by the volume of reported cases, eminently requires that the liberty of an individual should not be dependent upon the circuit wherein he is tried. The confused state of the law on the subject calls for authoritative resolution.

Question No. 2

Whether the curtailment of cross-examination regarding Berner, a paid Government informer in this and other cases, coupled with the Government's failure to produce him or to account for his absence, was not in contravention of this Court's recent holding in *Roviaro* v. *United States*, 353 U. S. 53, 1 L. Ed. 2d 639.

This point is argued in extenso in our brief below (pp. 17-24), and is treated in some detail in the opinion of the Court of Appeals (pp. 670-673). That opinion places considerable stress upon a passage in the cross-examination of agent Wurms by Ogull's counsel from which it is inferred that counsel deliberately disclaimed any desire to know Berner's address. Actually the fair meaning of the inquiry is indicated by the words supplied in parentheses below:

> "Q. You have his (present) address, have you not? A. The last address.
>
> "Q. I don't want to know his (last) address. Does your office have his (present) address? A. One address in Brooklyn we had for him."

Unless the words supplied are understood, there would be no point whatsoever to the second question, "Does your office have his address?" If the construction we suggest is incorrect, the only other reasonable interpretation is that counsel was attempting to protect the agent's natural reluctance to impart knowledge of the whereabouts of the informer; still it was important to show that the agent had knowledge of where Berner could then be found. The opinion of the Court of Appeals takes the colloquy out of context, for the record is replete with proof that the Government advisedly sought to keep Berner out of Court.

The entire procedure followed by the Government with reference to Berner contravenes the principles enunciated in the *Roviaro* case, *supra*, as well as the holding in *United States* v. *Reynolds*, 345 U. S. 1, 97 L. Ed. 727.

Question No. 3

Whether it was not improper and prejudicial to petitioners for the Government to place on the stand a witness who it had reason to believe would, and actually did, in the presence of the jury, invoke the Fifth Amendment.

The two cardinal aspects of this point are: (1) the Government admittedly (R. 541-542) had reason to believe that Harell would invoke the Fifth Amendment; (2) the entire subject of the validity of the claim of privilege, actual or potential, should have been investigated by the trial Court in the absence of the jury. See *Wilmerding* v. *United States*, 4 F. 2d 209, cert. den. 267 U. S. 605, 69 L. Ed. 810.

The grave prejudice to the rights of petitioners is unquestionable. The assertion of the claim of privilege, popular as it may be in Congressional investigations, is relatively infrequent in the trial of any action or prosecution. It necessarily makes a deep impression upon jurors. They would be quite likely to draw this inference: the witness has previously admitted his guilt, and, while the Government wants him to implicate the defendants on trial, he declines to do so. Is his reason not rather to protect them than to shield himself? Is he not apprehensive of retaliation by them? In any case, the entire incident is indicative of defendants' guilt.

We would be the last to deny the wholesome invocation of the Fifth Amendment as a constitutional protection for all. But it should not be utilized as a tool to create prejudicial inferences against persons on trial for their liberty. It does not suffice to say that the trial would have been fairer had the incident been omitted. Since it is established that the Government had good reason to apprehend that a claim of privilege might be asserted, the matter should have been relegated to preliminary exploration, in

the absence of which the Government became endowed with a powerful weapon tending towards the deprivation of a fair trial.

Question No. 4

Whether it was not error to deny the defense motion to dismiss on the ground that entrapment of petitioner Ogull was established.

This question was summarily disposed of by the Court of Appeals, which took the position that it was one for jury determination, especially in view of the circumstance that the transactions covered a period of several months. A motion on petitioner Ogull's behalf duly reserved the point (R. 543), and it is clear that its validity would naturally inure to the benefit of petitioner Gernie.

The law on the subject has been clearly stated by this Court in *Sorrells* v. *United States*, 287 U. S. 435, 77 L. Ed. 413, and applied by the various circuits.

The Court of Appeals erred herein, it is submitted, in subscribing to the view that nothing more than a jury issue was presented, and in holding that the defense of entrapment was vitiated by the continuation of improper activities for some time, a ruling for which there appears to be no controlling authority.

Question No. 5

Whether it was not error to refuse a mistrial after the reception of incompetent and unresponsive testimony that petitioner Ogull planned to engage in the operation of a gambling house in violation of the California Penal Code.

This point was not discussed in the opinion, but we deem it important. Below we cited numerous authorities wherein convictions were reversed on the same ground. The fact that the point is elementary does not detract from its gravity. It is still the law, as stated in *People* v. *Horie*, 258 App.

Div. 246, 16 N. Y. S. 2d 235, that "the improper admission of evidence of other crimes constitutes a very serious infraction of the rights of a defendant."

Was it not enough that petitioners were confronted on the trial with the universal abhorrence of traffic in narcotics? Any one accused of such an offense, experience teaches, has an uphill fight in defending against the indictment. The interests of justice require that he be not subjected to the additional and crushing burden of insinuations of complicity in other crimes.

Question No. 6

Whether it was not error to deny a motion to strike incompetent and prejudicial testimony that petitioner Gernie at the time of his arrest had in his possession a certain marked bill more than two months after it had been paid to another person for narcotics by a Government agent.

The only reference to this testimony in the opinion of the Court of Appeals is the following (p. 667):

> "When Gernie was arrested 68 days later on September 18, he had in his wallet one of the $100 bills which Wurms had given to Buzzeo on July 12."

The same observation is repeated (p. 669), and the purpose of the Court in mentioning it is to support its argument of the sufficiency of the evidence to sustain petitioner Gernie's conviction.

In other words, the receipt of the testimony was not dismissed as harmless error. On the contrary, the Court of Appeals relied upon it as being indicative of guilt. This position, we submit, fortifies our argument that the evidence should never have been received. The holding is at variance with this Court's decision in *Williams* v. *United*

States, 168 U. S. 382, 42 L. Ed. 509, and squarely opposed to the Ninth Circuit view expressed in *Lee* v. *United States*, 245 F. 2d 322.

If the matter be regarded as one of original impression, it appears obvious that guilt may never be shown or even reenforced by a person's possession of a piece of marked currency several months after it constituted the consideration for an illegal transaction. That this altogether fortuitous circumstance should be regarded as incriminating accords neither with reason nor common sense. Otherwise the use of currency in the thousands of innocent transactions wherein it is employed every day would become fraught with peril. Certainly the evidence should not have been received herein.

Question No. 7

Whether in charging on the credibility of witnesses found to have testified falsely in one respect, the Trial Court did not err in omitting the necessary qualification that the testimony involved had to relate to material facts.

This point involves a controversial question on the law of evidence, wherein the Government placed strong reliance below on the opinion ventured in 3 Wigmore on Evidence, Sec. 1014. However, the Supreme Court of the United States has not always been in accord with Wigmore's views, notably rejecting them in *Krulewitch* v. *United States*, 336 U. S. 440, 93 L. Ed. 790. The question is especially important herein by reason of the fact that the case presented issues of the credibility of many witnesses.

Question No. 8

Whether in any event the cumulative effect of the errors urged was not such as to deprive petitioners of a fair trial.

The best that can be said for the Government's position is that the proof against petitioner Gernie was certainly not of a clear or conclusive character, while the proof against petitioner Ogull was strongly indicative of entrapment. The least weight ascribable to this aspect of the case is that they were entitled to a trial free from prejudicial error, so that incorrect rulings which might otherwise be disregarded must be given greater force in their possible bearing upon the outcome.

The cumulative effect of as few as two errors may necessitate the reversal of a conviction. See *Gordon* v. *United States*, 344 U. S. 414, 97 L. Ed. 447. Particularly where the case is "a close one" and not "open and shut," an error otherwise harmless will be deemed prejudicial. *Bihn* v. *United States*, 328 U. S. 633, 90 L. Ed. 1485. See also *United States* v. *Tomaiolo* (C. A. 2) 249 F. 2d 683 (advance sheets of January 27, 1958).

While petitioners have no inclination to press questions of fact, it is urged that the element of innocence should not impair the arguments presented to this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioners.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 173—October Term, 1957.

(Argued November 18, 1957 Decided February 13, 1958.)

Docket No. 24634

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH GERNIE and EDWARD OGULL,

Defendants-Appellants.

Before:

HAND, MEDINA and LUMBARD,

Circuit Judges.

Appeal from conviction and prison sentence of 10 years for Gernie and 5 years for Ogull following their conviction by a jury in the Southern District of New York for violation of the narcotic laws, and conspiracy, 21 U. S. C. A. §§ 173, 174 and 18 U. S. C. A. § 371, Edmund L. Palmieri, *J.* Affirmed.

JEROME J. LONDIN and ROBERT B. FISKE, JR., Assistant United States Attorneys, Southern District of New York, New York, N. Y. (Paul W. Williams, United States Attorney, Southern District of New York, on the brief), *for appellee.*

JACOB W. FRIEDMAN, New York, N. Y., *for defendants-appellants.*

LUMBARD, *Circuit Judge*:

The four principal questions on appeal are (1) whether there was sufficient evidence to support Joseph Gernie's conviction, (2) whether the court erred in denying defense motion to dismiss the indictment against Ogull because of entrapment, (3) whether the court erroneously restricted cross-examination of narcotic agent Wurms regarding the whereabouts of the government's former special employee, Max Berner, who was not produced as a witness, and (4) whether it was error to call Benjamin Harell to testify in view of his claim of Fifth Amendment privilege.

Gernie and Ogull were charged, with Philip Buzzeo and Michael Mayer, with conspiracy to violate the narcotic laws during the period April 1, 1956-October 19, 1956 (Count 7). They were also charged with the sale of heroin: Ogull and Buzzeo on April 14, 1956 (Count 1), all four defendants on June 4, 1956 (Count 2), Gernie, Ogull and Buzzeo on July 12, 1956 (Count 3), Gernie and Mayer on August 2, 1956 (Count 4), and Gernie and Mayer on August 6, 1956 (Count 5). In addition, Gernie and Mayer were charged with possession of heroin on September 18, 1956 (Count 6), 21 U. S. C. A. §§ 173, 174; 18 U. S. C. A. § 371.

Buzzeo and Mayer pleaded guilty to all the charges against them and were sentenced respectively to 5 years in prison and a fine of $5,000, and 5 years, 6 months in prison.

At the end of a six day trial the jury found Gernie and Ogull guilty as charged on all counts, except Count 4 which had been withdrawn by the government at the end of its case.

On February 19, 1957, Judge Palmieri sentenced Gernie [1] to 10 years imprisonment and fined him $5,000, and Ogull to 5 years imprisonment on Counts 1, 2, 3 and 7, to be served concurrently.

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[1] Gernie's sentence was 5 years on Counts 2 and 3, and 10 years on Counts 5, 6 and 7, the sentences to run concurrently. A $5,000 fine on Count 7 was also imposed.

A narrative of the evidence concerning the clandestine operations of the four defendants over a period of several months discloses an abundance of evidence both direct and circumstantial to support the jury's verdict of guilty.

On April 13, 1956 government agents first made contact with the defendants when special employee Max Berner introduced agent Wurms to Edward Ogull in King's Diner at 360 Twelfth Avenue, New York. Ogull summoned Buzzeo by telephone. Finally Wurms, Buzzeo and Berner talked in a parked automobile and Wurms arranged to buy a quarter kilogram of 85% pure heroin from Buzzeo that night for $2,750. The delivery did not take place that night as scheduled as Buzzeo was cautious, and, after visiting several places with Wurms, he told Wurms that his people were satisfied and he would have to return the following evening to the Ship Ahoy Restaurant at 101 West 66th Street. On April 14 they went to a bar at 200 West 70th Street and from there to a Cadillac parked at 72nd Street and Riverside Drive. While they were driving east in the Cadillac Buzzeo handed Wurms a paper bag containing the heroin and Wurms paid him $2,750. As Wurms got out Buzzeo said if he wanted some more heroin he should contact Eddie, meaning Ogull.

Wurms, with Max Berner, again met Ogull on April 20 at McGinnis' Bar, 304 West 40th Street, and when Wurms complained of the "merry-go-round" he had gone on for the heroin, Ogull said he would not be put to such trouble in the future.

A week later, on April 27, Wurms and Berner went to the Scarlet Patch Bar, 403 East 57th Street and Wurms talked privately with Ogull who wanted to sell him cocaine. According to the government's case, Berner had no contacts with the defendants after April 27.

Wurms next telephoned Ogull on May 3 at Pier 74 at a number given him by Max Berner and Wurms and Ogull met later at the Scarlet Patch. Subsequent calls by Wurms on May 7, 10 and 11 were unproductive as Ogull said he

was unable to reach "Bob," referring to Buzzeo. At another meeting at the Scarlet Patch on May 22 Ogull rebuffed Wurms' suggestion that he be introduced to a new source of supply.

After a telephone call and meeting with Ogull, on June 1, Wurms met Buzzeo at the Ship Ahoy at 5:00 P. M. on June 2 where arrangements were made to deliver a quarter kilogram at the same place at 9:30 P. M. two days later.

On June 4, after a short talk at the Ship Ahoy, Wurms and Buzzeo drove in Buzzeo's Chevrolet to 76th Street where they parked near the Devonshire Garage just east of Broadway at 9:55 P. M. Wurms gave Buzzeo $3,000 in cash, Buzzeo left the car and entered the nearby Lighthouse Cafe where he made a telephone call. Five minutes later the defendant Gernie entered the cafe and joined Buzzeo at the bar. After a brief conversation, Gernie made a telephone call. Then both men went to the basement and returned to the bar a few minutes later. Gernie then went to the front window and looked out for about five minutes. At about 10:05 P. M. defendant Michael Mayer drove by in a 1955 Oldsmobile automobile usually driven by Gernie. Mayer proceeded to the Devonshire Garage where he parked and entered the garage office. When Mayer drove by the Lighthouse Cafe, Gernie turned abruptly, returned to Buzzeo at the bar and proceeded to the garage office where he met Mayer. Mayer then drove away in the Oldsmobile and Gernie returned to Buzzeo. They then left the cafe and proceeded to the garage office. Buzzeo remained in the office only a moment. Gernie watched him carefully as he returned to the car where Wurms was waiting. Wurms and Buzzeo drove off in Buzzeo's Chevrolet and, en route, Buzzeo handed Wurms a package containing the heroin.

Wurms next met with Ogull and Buzzeo on June 12 at Charlie's Diner, 394 Twelfth Avenue, where they discussed Wurms' complaint about the quality of the heroin purchased on June 4 and a reduction in price for the next purchase.

A July 11 meeting of Wurms and Buzzeo, arranged by Ogull, led to the sale of another quarter kilogram for $2,800 on July 12. Wurms and Buzzeo met at the Dolphin Cafe, 1975 Broadway at 9:30 P. M. and drove in Buzzeo's Chevrolet to the Devonshire Garage where they parked east of the office. Wurms gave Buzzeo $2,800 in bills the serial numbers of which he had recorded. A few minutes later Gernie drove into the garage entrance in the 1955 Oldsmobile. Gernie parked the car in the garage, met Buzzeo at the side door of the Lighthouse Cafe on 76th Street, they shook hands and went in and when they came out a few minutes later, Gernie was walking behind Buzzeo. They both went into the garage and Buzzeo got into Gernie's Oldsmobile, sat on the front seat for a moment with his feet remaining on the pavement, got out and spoke to Gernie, and then rejoined Wurms in the Chevrolet. Buzzeo then took a package from under his sport shirt and gave it to Wurms who later found that it contained heroin. When Gernie was arrested 68 days later on September 18, he had in his wallet one of the $100 bills which Wurms had given to Buzzeo on July 12.

Subsequent events in August further evidenced the business relationship of defendants Gernie and Mayer and the stealthy nature of their operations.

On August 2, 1956, two men, one of whom was Benjamin Harell, met Mayer at the West End Garage. Mayer immediately drove off in his Pontiac and went into 307 West 69th Street, where he lived. Gernie had already entered the building and his Oldsmobile was parked in the block at the time. Gernie came out of the building with Mayer and when Mayer drove off to a meeting with Harell, Gernie reentered 307 West 69th Street.

On August 6, 1956 Gernie drove up to 67th Street and Columbus Avenue, where he parked. Gernie walked over to Mayer's Pontiac and threw a dark package into it. He then entered the 67th Street Garage, where he met Mayer. Mayer immediately left the 67th Street Garage and drove

off in the Pontiac to 307 West 69th Street which he entered. Gernie was joined in the 67th Street Garage by Harell, who, after a brief conversation, drove away. Narcotic agents arrested Harell at 102nd Street and the East River Drive and found over 2 ounces of heroin.

Mayer was arrested on September 18, 1956 in 307 West 69th Street. In his pocket the agents found two double glassine envelopes containing about 1½ ounces of heroin. In Mayer's apartment the agents found 56 ounces of heroin in a leatherette case, several brown paper bags, and under his daughter's bed a Speed stapling machine and miscellaneous assorted equipment for the weighing, cutting and packaging of narcotics. There was expert testimony to show that the Speed stapling machine found in Mayer's apartment was the machine which pressed the staples to seal: (1) the quarter kilogram of heroin purchased on July 12, 1956 by Wurms, when Buzzeo got it from Gernie's Oldsmobile, and (2) the 2 ounces of heroin seized from Harell on August 6, 1956 after his meeting with Gernie.

Gernie was also arrested on September 18 and, in addition to the $100 bill already mentioned, he had in his possession the registration to the Oldsmobile car, although he denied having anything to do with the car or that he drove a car. Ogull, when he was arrested on October 4, denied that he had ever seen agent Wurms.

The mere recital of the evidence answers Gernie's claim that the evidence against him was insufficient. It was quite ample to sustain his conviction.[2]

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[2] Gernie did not take the stand, but instead called his co-defendant Michael Mayer who had already pleaded guilty. Mayer took the full blame for the transactions charged and said that Gernie had had nothing to do with them. However, his testimony regarding Gernie's visits to Mayer's apartment at 307 West 69th Street, Gernie's use of the Oldsmobile car which belonged to a mutual relative of Mrs. Mayer and Gernie, and his admissions to meeting Gernie at the Devonshire Garage to pick up the Oldsmobile, may have helped the government more than the defendant Gernie.

The second claim of error involves Ogull's defense of entrapment. Ogull took the stand and claimed that Max Berner and agent Wurms had entrapped him into arranging a contact with Buzzeo for the purchase of narcotics in return for their promising to help him in the financing of a real estate venture. Ogull admitted several meetings with Berner and Wurms and his introduction of Buzzeo to Wurms and claimed that he did not see them after July 12. As Wurms' version of the conversations and the dealings with Ogull was quite at variance with Ogull, who admitted that nothing was ever done for him with regard to any financing or any real estate, the issue of entrapment was a question of fact for the jury. Judge Palmieri's instructions on entrapment and on all phases of the case ... re clear and accurately guided the jury. In view of Ogull's activities lasting from April to August 1956, and, according to his own testimony, from April to July 12, 1956, and the insubstantial nature of his explanation for introducing Buzzeo to agent Wurms, the motion to dismiss was properly denied, and the judge was fully warranted in leaving the question of entrapment to the jury.

The third claim of error has to do with the curtailment of the cross-examination of agent Wurms regarding Max Berner, a special employee of the Narcotics Bureau, and the government's failure to produce him or to account for his absence.

A study of the record reveals that the defense had the means of securing information as to Berner's whereabouts and it chose not to secure the information. Indeed from what transpired at the trial we conclude that the defense abandoned its demand for Berner and that it cannot now claim that failure to produce him was error. Furthermore, there was no showing that the government had any more information as to Berner's whereabouts than was available to the defense.

On February 4, 1957, before the jury was selected, counsel for Ogull, in a conference held in the robing room, asked

the government "to have Mr. Berner here for me so that I may speak to him, because if the Government does not call him as a witness, and I feel the Government should, I might have to," because his testimony might have a bearing on the issue of entrapment. Counsel said he had been trying to find him but had been unable to locate him although he had known Berner for many years. He requested the court to ask the government to produce him "so I might speak with him."

The Assistant United States Attorney then stated that to the best of his knowledge Berner was not available and the government could not produce him and did not intend to use him.

The Court said to the Assistant "I would appreciate it if you communicate with the agent in charge of this case in order to ascertain his whereabouts, and if he can be made available, please see that that is done. If he can't, please advise me and the attorney as quickly as possible."

Counsel then argued that it was a "very unfair method of prosecuting" for the government not to produce Berner as its witness. The trial judge pointed out that he was not in a position to instruct the government how to prove its case, and he added "As the evidence proceeds you can make such motions and requests as you think you are justified in making."

The government's first witness, agent Wurms, was cross-examined at length regarding Max Berner. Part of the cross-examination went thus:

> "Q. You have his address, have you not? A. The last address.
>
> Q. *I don't want to know his address.* Does your office have his address? A. One address here in Brooklyn we had for him.
>
> Q. Do you know where his wife lives? A. Yes, sir.
>
> Q. Were you to his home? A. Yes, sir." (Italics supplied.)

Wurms testified further that he had last seen Berner in the latter part of September 1956 and that he had no information of his whereabouts.

But it is clear that Ogull's counsel deliberately chose not to ask for further and more specific information when agent Wurms testified regarding Berner's business association, that he had a Brooklyn address for Berner, that he knew where his wife lived and had been to his home. He said "I don't want to know his address."

On February 7, arguing a motion to dismiss at the end of the government's case, Ogull's counsel stressed the weakness of the case because of the failure to produce Berner but no further reference was made to the previous demand to produce Berner. In fact, after the first day of trial no further demand of any kind was made for Berner's production or for any information concerning him. It seems quite apparent that the subject of producing Berner was dropped by common consent. Ogull, perhaps because he knew Berner was not to be called as a witness, himself took the stand. Ogull's counsel may well have concluded that as things stood he no longer saw any advantage in pressing for Berner's appearance. He thus left the question open for argument to the jury that there was a vital weakness in the government's case by reason of Berner's failure to testify.[3]

Thus it appears that the defendant Ogull knew who Berner was and in fact had known him for two years. The government witness, agent Wurms, fully answered all questions which had any bearing on where Berner was or where he might be found. Even more, Wurms indicated his ability to give more detailed information regarding Berner and the defense chose not to follow it up.

Although on the first day of the trial the judge asked the Assistant United States Attorney to inform him and defense counsel if Berner could not be made available, no

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[3] We are not informed regarding the summation of Ogull's counsel. While it was recorded by stenographic notes, the notes have not been transcribed.

further mention was made of this request. The trial judge coupled his request with the statement to defense counsel that, as the evidence proceeded, he could make such motions and requests as he might wish. No further motion or request was ever made during the remaining week of the trial. Instead, defense counsel pursued a half-hearted cross-examination of Wurms on matters touching on Berner's whereabouts and thereafter counsel was content to drop the matter after it became clear that Berner would not be produced by the government.

Roviaro v. *United States*, 353 U. S. 53 (1956), relied on by the appellants, is not in point as the trial court there had sustained the government's refusal to divulge the name or whereabouts of "John Doe" by bill of particulars before trial and by cross-examination of the government's witnesses. In *Roviaro* the defense never did know who "John Doe" was. Here Ogull had known Max Berner for at least two years. *Sorrentino* v. *United States*, 163 F. 2d 627, cited with approval in *Roviaro* v. *United States*, 353 U. S. 53, 62, fn. 12.

Thus we come to the question of whether it was error for the government to call Benjamin Harell as a witness in view of his refusal to testify regarding the source of the heroin of which he had admitted possession on August 6, 1956.

After agents had observed Harell and one Joseph Edwards meet with defendant Gernie in the 67th Street Garage, he was arrest on the East River Drive in possession of 2 ounces of heroin. He was indicted on August 31, subsequently pleaded guilty to all three counts which charged unlawful possession of $2\frac{1}{2}$ ounces of heroin, and conspiracy with Edwards and others to traffic in narcotics in violation of law, and, prior to Gernie's trial, he was sentenced to 5 years imprisonment.

The government called Harell as its witness. Harell in answer to questions admitted that he had heroin in his possession when he was arrested in August, and that he had pleaded guilty to an indictment, and had received a 5 year sentence. When the prosecutor asked him where he ob-

tained the heroin he said he wanted to "take the Fifth Amendment" and refused to answer. The trial judge finally sustained Harell's refusal, and in his charge to the jury he instructed the jury that this refusal was not to be taken as evidence against the defendants.

The government had a right to call Harell to testify. The testimony of his meeting with Gernie and his possession of heroin immediately thereafter was material and relevant to the case. Had the government not produced him the defense could have argued that its failure to call him showed that he would not corroborate the testimony of the agents. Under such circumstances it makes no difference whether the government has reason to believe that the witness will refuse to testify. It has a right to produce the witness and thus show the jury that it is bringing forward such witnesses as may have knowledge bearing on the case. *United States* v. *Romero*, 249 F. 2d 371 (2 Cir. 1957) and *United States* v. *Cioffi*, 242 F. 2d 473, 477 (2 Cir. 1957).

Indeed the government had the right to compel Harell to answer the questions as he had pleaded guilty and could not be further incriminated by answering where he had obtained the heroin. *United States* v. *Romero*, *supra*; *United States* v. *Cioffi*, *supra*.[4] We think the judge erred in sustaining the witness' claim of privilege.

In any event the judge's charge that the jury was not to consider Harell's refusal as evidence against the defendants was all they were entitled to.

The other claims of error are too insubstantial to require comment. The judge quite properly admitted the $100 bill in evidence against Gernie.

Judgments of conviction are affirmed.

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[4] Thus we find it unnecessary to refer to additional facts which indicated that Harell had already talked freely on at least two occasions, and the prosecutor had reason to believe that he would answer questions again.

We also note that under the Narcotic Control Act of 1956, 18 U. S. C. A. § 1406, the prosecutor had the power to give the witness immunity and compel his answers, although the government did not choose to act under this statute after the judge sustained Harell's claim of privilege.

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No. 914

In the Supreme Court of the United States

OCTOBER TERM, 1957

JOSEPH GERNIE AND EDWARD OGULL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 19–29) is reported at 252 F. 2d 664.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1958. An application for rehearing was denied on March 12, 1958. The petition for a writ of certiorari was filed on April 11, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to submit the case against petitioner Gernie to the jury.

2. Whether it was reversible error to permit testimony that when petitioner Gernie was arrested on September 18, 1956, he was found possessed of $100 of the marked funds that a federal agent had given a defendant when he purchased narcotics from him on July 12, 1956.

3. Whether petitioner Ogull's claim of entrapment was properly left to the jury.

4. Whether petitioners were prejudiced by witness Harrell's claim of the privilege against self-incrimination.

5. Whether defendant Buzzeo's statement to agent Wurms that he was interested in a California restaurant which could be employed for gambling was prejudicial to petitioner Ogull.

6. Whether reversible error resulted from the trial judge's instruction to the jury that, if it believed a witness testified falsely as to one thing, it could reject his entire testimony.

STATEMENT

On October 19, 1956, a 7-count indictment was returned in the United States District Court for the Southern District of New York charging that petitioners, together with defendants Philip Buzzeo and Michael Mayer, conspired to violate the federal narcotics laws from April 1, 1956, up to and including the date of the indictment (Count 7; App. 1a, 11a–15a).[1] These same individuals were also charged with the wilful receipt, sale and concealment of heroin as

[1] "App." designates petitioners' appendix in the Court of Appeals, included in the record now before this Court. "R." designates the trial transcript filed herewith.

follows: Ogull and Buzzeo on April 14, 1956 (Count 1; App. 7a); all four on June 4, 1956 (Count 2; App. 8a); Ogull, Gernie and Buzzeo on July 12, 1956 (Count 3; App. 8a–9a); Gernie and Mayer on August 2, 1956 (Count 4;[2] App. 9a), August 6, 1956 (Count 5; App. 10a) and September 18, 1956 (Count 6; App. 10a-11a).

Following a jury trial, petitioners Gernie and Ogull were convicted as charged.[3] Petitioner Ogull was sentenced to 5 years imprisonment on each of Counts 1–3 and 7, to run concurrently (R. 618–619). Petitioner Gernie was sentenced to a total of 10 years imprisonment: 5 years on each of Counts 2 and 3, and 10 years on each of Counts 5, 6, 7, the sentences to run concurrently. He was also fined $5,000 on Count 7 (R. 619). On appeal, the convictions were unanimously affirmed (Pet. App. 19–29).[4]

The pertinent evidence adduced by the government may be summarized as follows:

1. On April 13, 1956, Maxwell Berner, a special employee of the Bureau of Narcotics, introduced federal undercover agent Wurms to petitioner Ogull at King's Diner, 360 Twelfth Avenue, New York City (R. 26–27). Ogull summoned defendant Buzzeo by

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[2] Count 4 was withdrawn at the conclusion of the government's case (R. 327).

[3] On the day set for trial, Buzzeo and Mayer pleaded guilty to each count of the indictment in which they were named. Buzzeo was sentenced to a total of 6 years imprisonment and a $5,000 fine. Mayer was sentenced to 5½ years imprisonment (R. 2–6; 619–620).

[4] Petitioners' application for bail pending appeal to this Court was denied by Mr. Justice Harlan on January 2, 1958.

phone, and he arrived soon thereafter (R. 27–29). Buzzeo had been informed by Ogull that Wurms was desirous of purchasing heroin of 85% purity (R. 29–30). In the course of their conversation, Buzzeo agreed to sell approximately 8 ounces of heroin to Wurms for $2,750 (R. 30–31). Buzzeo being cautious, however, the actual sale did not take place until the following evening (R. 36–39). After this transaction (Count 1), Buzzeo instructed Wurms to contact "Eddie" (Ogull)[5] whenever he wanted more heroin (R. 39).

On April 20, 1956, accompanied by Berner, agent Wurms met petitioner Ogull at McGinnis's Bar, 304 West 40th Street, New York City, and discussed the April 14th purchase with him. Ogull praised the quality of the heroin and advised Wurms that he would encounter no further delays in his purchases (R. 46). A week later, on April 27, 1956, Wurms, again accompanied by Berner,[6] met petitioner Ogull at the Scarlet Patch Bar, 403 East 57th Street, New York City. Wurms engaged in a private conversation with Ogull, during which Ogull sought to sell him cocaine at $1,300 an ounce (R. 47–48). Wurms had never before discussed cocaine with Ogull (R. 48). When Wurms said this was a higher price than mentioned by Buzzeo,[7] Ogull informed him that this

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[5] Wurms identified Ogull as the individual he had been introduced to under the name "Eddie Brandeis" (R. 26–27, 39).

[6] This was the last time Berner participated in any of the arrangements.

[7] Buzzeo had previously told Wurms that he could get him cocaine at $900–$1,100 an ounce (R. 32–33).

was the price he was told to ask and that they had "5 pieces" for sale* (R. 48). No heroin sale was arranged at this meeting (R. 49).

Agent Wurms' attempts to arrange sales through Ogull on May 3, 4, 7, 10 and 11 proved to be unsuccessful because Buzzeo was unavailable. On May 22, Wurms again met Ogull at the Scarlet Patch Bar and was told that Buzzeo could still not be contacted. Ogull refused, however, to introduce the agent to another source of heroin informing him that he would have to wait until Buzzeo returned to the city (R. 52–53). At this meeting, Ogull sought to persuade Wurms to purchase a whole kilo of heroin (about 35 ounces) at the next sale (R. 53–54).

2. On June 1, 1956, Ogull met again with agent Wurms and this time arranged for the agent to see Buzzeo at 5 p. m., the next day, at the Ship Ahoy Bar, 101 West 66th Street, New York City. Ogull was disappointed when Wurms said he could buy only a quarter of a kilo of heroin (about 8 ounces). He thereupon informed the agent that the price had gone up a few hundred (R. 54–55). At his meeting with Buzzeo, Wurms was informed that the price would be $3,000, that the heroin would be of the same quality as before and that it would come from the same source (R. 55–56). The actual sale was arranged for June 4 (R. 56–58). On that day, at 9:30 p. m., Wurms met Buzzeo at the Ship Ahoy. From there, they drove in Buzzeo's car to 76th Street and Broadway and parked across the street from the Devonshire

*In the parlance of the narcotics traffic, "piece" means an ounce (R. 48).

Garage (R. 58–60). At this point, Wurms gave Buzzeo $3,000 in marked funds (R. 60). Buzzeo then left the car, crossed the street and entered the Lighthouse Cafe at 76th Street and Broadway. Immediately after entering he made a phone call (R. 162, 209). About five minutes later, petitioner Gernie entered the Cafe and joined Buzzeo at the bar. Following a brief conversation, Gernie made a telephone call. Both men then went down to the basement. Upon their return a few minutes later, Gernie stationed himself at a window facing 76th Street and the corner of Broadway (R. 162–164, 210). A little after 10:00 p. m., defendant Mayer drove past the Lighthouse Cafe in a 1955 Oldsmobile[*] and parked in front of the Devonshire Garage (R. 61, 210). Thereupon, Gernie abruptly left his observation post, spoke to Buzzeo, and walked to the office of the Devonshire Garage where he joined Mayer. A few minutes later, Mayer drove off in the Oldsmobile and Gernie returned to the Cafe. He picked up Buzzeo and returned to the garage (R. 61–63, 164–166, 211, 314–315). A moment later, Buzzeo left the garage and under Gernie's surveillance returned to the car where he had left agent Wurms and announced, "I have the stuff" (R. 62–63, 166). Still watched by Gernie (R. 166), agent Wurms and Buzzeo drove off. Shortly thereafter, Buzzeo turned over to Wurms a package containing over 8 ounces of heroin (R. 63, 67; count 2).

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[*] The registration for the car was later found in petitioner Gernie's possession. It was apparently owned by a relative, but was usually driven by Gernie (R. 181–182).

On June 12, 1956, Wurms met with Ogull at Charlie's Diner, 394 Twelfth Avenue, and complained as to the quantity, quality and price of the heroin obtained on "the last deal" (R. 67–68). Ogull then called Buzzeo to join them. After repeating his complaints to Buzzeo, Wurms was informed that the price on the next sale would be cut by $200 and that he would still have to operate through Ogull, who gave Wurms his home number (R. 69–72, 429).

3. On July 11, agent Wurms arranged through Ogull another meeting with Buzzeo (R. 72–75). At about 9 p. m. on the next day, Wurms met with Buzzeo at the Dolphin Cafe, 1975 Broadway (R. 74–75). About 10:30 p. m., they drove to the vicinity of the Devonshire Garage (R. 76, 167). Wurms handed over $2,800 in marked funds, and Buzzeo left the car and entered the Lighthouse Cafe (R. 78–79, 167.) At about 10:50 p. m., Gernie drove up to the Devonshire Garage in the same 1955 Oldsmobile that Mayer had driven on June 4th (R. 79, 167). Gernie parked the car in the garage, walked up to the Lighthouse Cafe, shook hands with Buzzeo who came out to meet him, and entered the Cafe (R. 79–80, 167–168, 318–319). After remaining inside for a few minutes, both men walked to the garage. Buzzeo entered Gernie's car, sat in it for a moment, conversed with Gernie, and then rejoined Wurms (R. 80, 168–169. In the car he removed from under his sport shirt a package which he gave to Wurms (R. 81). This package

contained over 8 ounces of heroin (R. 81–87; Count 3).[10]

4. On August 2, 1956, two men later identified as Harell and Jackson parked near the West End Garage at Columbus Avenue and Central Park West, New York City. Harell entered the garage, remained inside a few minutes and then returned to his car. Immediately thereafter, Mayer walked out of the garage, entered his car (a 1952 Pontiac) and drove away. Federal agents followed Mayer to 307 West 69th Street and saw him enter the premises. About 10 minutes later, Mayer came out accompanied by Gernie. Mayer then entered his car and drove to the 67th Street Garage, where he met with Harell for a few moments (R. 204–208; see also testimony of Agent O'Connor, R. 212–214).

On August 6, at about 9:45 p. m., Gernie drove to the vicinity of the West Side Garage, walked over to Mayer's Pontiac parked nearby, opened the door and threw a dark package inside (R. 152, 159, 215, 322). He then entered the garage. Immediately thereafter, Mayer left the garage, entered his Pontiac, and drove to the premises of 307 West 69th Street (R. 215). Gernie was then joined in the garage by Harell. Two or three minutes later, Harell left the garage and drove off. His car was followed by federal agents and stopped at 102nd Street and East River Drive. He was placed under arrest and

[10] When Gernie was arrested on September 18, 1956, $100 of the marked funds given by Wurms to Buzzeo on this occasion was found in his possession (R. 169–171, 178).

was found to possess over 3 ounces of heroin (R. 154, 157–158, 216–217; Count 5).

5. On September 18, 1956, Mayer was arrested at his apartment at 307 West 69th Street. On his person was found a package containing an ounce and a half of heroin, and in his apartment about 56 ounces of heroin. In addition, there was found a Speed stapling machine and assorted paraphernalia for the weighing, packaging and cutting of narcotics (R. 224–251, 495–496; Count 6). The stapling machine was shown to be the same one which pressed the staples used to seal (1) the package containing the heroin purchased by Wurms on July 12, 1956, and (2) the package containing the two ounces of heroin seized from Harrell on August 6, 1956 (R. 278–291).

At the trial Mayer, who was called by the defense, testified that he became involved in the narcotics traffic and obtained the narcotics and packaging paraphernalia from a man named "Harry" (R. 468–469, 472–473). He said he did not remember Harry's last name or the name or address of the bar in which he had met him (R. 471, 491). He denied that petitioner Gernie was implicated in the narcotics transactions, or that he had so stated following his arrest (R. 487–488, 491, 497–498, 501, 503). In rebuttal, on the issue of Mayer's credibility, agent Pera testified that, following Mayer's arrest, Mayer had stated that Gernie had given him the narcotics found in his apartment and that he worked for Gernie in the narcotics operation (R. 517–521). The trial judge limited this rebuttal testimony to the question of Mayer's credibility (R. 544–547; 589–590).

ARGUMENT

1. Petitioner's Gernie's assertion that it was prejudicial error to submit his case to the jury because the evidence against him indicated nothing more than "innocuous activities" is baseless. The evidence developed at the trial reveals, *inter alia*, that, just before the consummation of each of the sales on June 4 (Count 2) and July 12 (Count 3), Gernie was observed by federal officers to come upon the scene, join Buzzeo in private conversation (in the Lighthouse Cafe and Devonshire Garage), and thereafter carefully observe Buzzeo return to agent Wurms possessed of narcotics (*supra*, pp. 6, 7). When Gernie was arrested on September 18, 1956, he was found possessed of a portion of the marked funds ($100) which agent Wurms had given Buzzeo for the narcotics on July 12.[11] Moreover, on August 2, 1956, Gernie was seen with Mayer at the latter's residence, shortly after Mayer's meeting with Harell and Jackson. On August 6, 1956, Gernie was seen throwing a dark package into Mayer's car before continuing on to a meeting with Harell at the West Side Garage. Harell was followed immediately after such meeting and found to be illegally possessed of narcotics (Count 5; *supra*, pp. 8-9).

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[11] The claim is made that it was reversible error to admit testimony concerning petitioner Gernie's possession of the marked funds because such possession (on September 18, 1956) was so remote from the date of the illegal transaction in which it was used (July 12, 1956) as to preclude its admissibility. But possession of the fruits of the crime less than two months after the crime was committed certainly was a fact admissible against Gernie. 1 Wigmore, *Evidence*, §§ 152-154 (3d ed. 1940). Cf. *Wilson* v. *United States*, 162 U. S. 613, 619. The effect of the time interval on the probative force of the evidence

It is thus readily apparent that the case against petitioner Gernie was properly submitted to the jury and, as pointed out by the court below, "was quite ample to sustain his conviction" (Pet. App. 24).

2. Petitioner Ogull contends that the trial court erred in submitting to the jury the issue of whether he was entrapped. Ogull's defense at the trial was based on the vague contention that he became involved in the narcotics transaction in April 1956 as "a favor" to his friend, special narcotics employee Maxwell Berner, because Berner indicated that he had some one in mind who might be able to aid Ogull in real estate transactions (R. 358–362, 384–386, 442–444). He admittedly continued as a contact between Wurms and Buzzeo through the 12th of July, even though he got no closer to the alleged real estate deal (R. 375, 448).[12] The testimony shows that, far from being an innocent victim enticed against his will into the narcotics traffic, Ogull was a ready and willing participant, and an aggressive promoter of the illegal enterprise. For example, Wurms testified that, following

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was for the jury. *Boehm* v. *United States*, 271 Fed. 454, 457 (C. A. 2); *United States* v. *Di Carlo*, 64 F. 2d 15, 17 (C. A. 2). The cases relied upon by petitioner are inapposite. In *Williams* v. *United States*, 168 U. S. 382, there was no connection between the sums deposited in defendant's bank account and the sum extorted in his official capacity. And in *Sun B. Lee* v. *United States*, 245 F. 2d 322 (C. A. 9), the court held inadmissible only that testimony showing defendant's possession of funds more than two years before the crime charge was committed. At the same time, it held admissible evidence that defendant had possession of marked bills used in the illegal narcotics sale (offense charged) immediately after such sale.

[12] Agent Wurms testified that his contact with Ogull continued through August 10, 1956 (R. 511–514).

the April 14th sale (Count 1), Ogull extolled the quality of the heroin Wurms had purchased and told him that there would be no further delays in delivery (R. 46); that, on April 27, Ogull sought to persuade him to buy "five pieces" of cocaine from Buzzeo (R. 47–48); and that Ogull thereafter sought to influence him to increase his purchases to a kilo of heroin (35 ounces) and was disappointed when Wurms decided to purchase less (R. 53–54). On this evidence, Ogull was entitled to no more than that the jury pass upon his claim of entrapment. *Sorrells* v. *United States*, 287 U. S. 435, 451; *Sherman* v. *United States*, 241 F. 2d 329, 333 (C. A. 9), certiorari denied, 354 U. S. 911.[13]

In this same connection, petitioners also argue that the government's failure to produce special employee Berner at the trial or to account for his whereabouts, coupled with the court's curtailment of cross-examination of agent Wurms regarding Berner, limited their opportunity to establish entrapment and was in direct contravention of this Court's ruling in *Roviaro* v. *United States*, 353 U. S. 53.

On February 4, 1956, before the jury was selected, the United States Attorney advised the trial judge that, so far as he knew, Berner was unavailable, that the government could not produce him and that it did not intend to use him as a witness (R. 9). During the trial, government counsel again pointed out that there was nothing to indicate that the govern-

[13] For this reason, the case does not present the issues now before this Court in *Masciale* v. *United States*, No. 84, and *Sherman* v. *United States*, No. 87.

ment had information of Berner's whereabouts (R. 103–104). Although petitioner Ogull's counsel made much of the fact that Berner was not produced by the government, he told agent Wurms, on cross-examination, "I don't want to know his address" (R. 101), and, as observed by the court below, "pursued a half-hearted cross-examination of Wurms on matters touching on Berner's whereabouts" (Pet. App. 28). Primarily, he asked numerous irrelevant and remote questions about Berner, questions properly excluded by the trial judge.[14]

The truth of the matter is that Berner was a minor figure in the negotiations with Ogull. His task was completed when he brought Wurms and Ogull together. Certainly, he cannot be compared to the nameless informer in *Roviaro* v. *United States*, 353 U. S. 53, 64, who "was the sole participant, other than the accused, in the transaction charged." On the contrary, Berner did not participate in Wurms' numerous conversations with Ogull and Buzzeo concerning narcotics,[15] and he completely dropped out of the picture as early as April 27. As petitioner Ogull and his counsel well knew, it was with agent Wurms that Ogull dealt in arranging the numerous meetings with Buzzeo, and it was Wurms' testimony that was significant in this case.

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[14] For example, whether Wurms knew how Berner came to go into the hat business (R. 92) and how many convictions Berner had (R. 93). See, also, R. 102.

[15] Except that it appears that Berner was present when Wurms conversed with Buzzeo on April 13 (R. 120) and when Wurms had a conversation with Ogull on April 20 (R. 46).

3. Benjamin Harell, to whom Gernie and Mayer had allegedly sold narcotics on August 6, 1956, was called as a witness by the government (R. 295). When asked where he had obtained the heroin found in his possession on that date, he invoked the privilege against self-incrimination, and his refusal to testify was sustained by the trial judge (R. 297–312). Petitioners argue that the government had reason to believe that Harell would invoke the privilege and that such action on his part seriously prejudiced petitioners in the eyes of the jury. As the government informed the trial judge, it had no reason to believe that Harell would claim the privilege[18] (R. 301–302, 539–542). And clearly, since he possessed narcotics immediately following his meeting with petitioner Gernie on August 6, 1956, there was every reason to believe that Harell's testimony would be highly relevant. Under these circumstances, the government acted properly in calling him as a witness. *United States* v. *Romero*, 249 F. 2d 371, 374–375 (C. A. 2); *United States* v. *Cioffi*, 242 F. 2d 473, 477 (C. A. 2), certiorari denied, 353 U. S. 975.

In any event, the jury was carefully instructed not to consider Harell's claim of privilege "as constituting evidence in this case against either defendant" (R. 586–587). And, absent a contrary showing, we must assume that the jury followed the instruction.

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[18] It was believed that since Harell had been convicted and sentenced for the very crime upon which he was called to testify he could not properly invoke the privilege (R. 301–302). The Court of Appeals agreed, stating that "the [trial] judge erred in sustaining the witness' claim of privilege" (Pet. App. 29).

Delli Paoli v. *United States*, 352 U. S. 232, 242–243; *Opper* v. *United States*, 348 U. S. 84, 94–95.

4. Petitioners make additional arguments characterized by the Second Circuit "as too insubstantial to require comment" (Pet. App. 29).

a. Agent Wurms testified that during a conversation on August 10, 1956, between himself, Buzzeo and Ogull, Buzzeo mentioned that a friend of his in California wanted to sell a restaurant which might carry gambling games in the back (R. 513). Ogull had previously testified that he had discussed a California real estate transaction with Berner (R. 360–361). Petitioners assert that it was prejudicial error to deny Ogull's motion for mistrial following Wurms' testimony, arguing that the jury was left with the belief that Ogull planned to operate a gambling house in violation of California law. This contention is frivolous. Wurms' testimony referred to Buzzeo, not Ogull. There was no implication that Ogull was involved in violations or proposed violations of California gambling laws.

b. The trial judge instructed the jury (R. 589):

> What do you do with witnesses if you find they told wilful falsehoods? The law says that you can either reject everything on the ground that all of the testimony is tainted by that falsehood or that you can accept that which is credible and reject that which is incredible. That is what the law says you can do with respect to witnesses who you believe told a wilful falsehood.

Petitioners contend that this charge was erroneous in that it omitted the necessary qualification that the

falsehood had to relate to material facts before the jury might reject a witness' entire testimony. As Professor Wigmore has said (3 Wigmore, *Evidence,* § 1014, p. 683 (3d ed. 1940)): "In the nature of character, a person who would lie upon a collateral point is perhaps likely to be a more determined liar than one who dares it only upon a material point; at any rate, there is no less call to distrust the former than the latter". See *United States* v. *Rutkin,* 189 F. 2d 431, 439 (C. A. 3), affirmed, 343 U. S. 130. Moreover, since no exception was taken to this instruction, it was not properly assignable as error. Rule 30, Federal Rules of Criminal Procedure.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1958.

U. S. GOVERNMENT PRINTING OFFICE 1958

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FILED
JUN 20 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 914

JOSEPH GERNIE and EDWARD OGULL,

Petitioners,

VS.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING ON DENIAL OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Joseph Gernie and Edward Ogull, respectfully pray for a rehearing of the order of this Court dated May 26, 1958, denying their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Basic Facts

Petitioners were convicted of violation of the narcotic laws and conspiracy. They were sentenced to prison terms of 10 years and five years respectively. The judgments of conviction were affirmed on February 13, 1958 (252 F. 2d 664). They duly applied for certiorari, which application was denied on May 26, 1958.

Argument

Petitioners assign the following reason for granting this petition:

I.

It has been consistently contended that the evidence fell far short of establishing a *prima facie* case of petitioner Gernie's complicity in any offense charged. The Government's brief in opposition to the original application attempted to justify his conviction (pp. 10-11) by referring to several aspects of the evidence. These items were: two conversations with Buzzeo, after which the latter was possessed of narcotics; Gernie's having on his person at the time of his arrest one of the marked bills an agent had given to Buzzeo 68 days previously; Gernie's being seen on one occasion with Mayer, his nephew, shortly after Mayer had met Harell and Jackson; and Gernie's placing in Mayer's car "a dark package," concerning whose contents no evidence was offered. The conclusion that the foregoing incidents were "quite ample to sustain the conviction" is utterly untenable. To say that individually or in the aggregate they are probative of anything is an arrant distortion of logic and common sense. Whatever was adduced in the attempt to implicate petitioner Gernie can merely be viewed as of slight, remote or conjectural significance. Indeed even this characterization accords to the events described a probative force of which they are quite devoid. No civil suit predicated upon Gernie's alleged ownership or possession of narcotics could fairly be maintained upon so flimsy a concatenation of circumstances, and *a fortiori* no criminal prosecution.

It is believed that the holding of the Court of Appeals herein is due in considerable measure to its attitude towards the quantum of proof required in criminal cases, which (erroneously, we contend) is regarded as being identical with what is essential in civil actions. The District Court

herein (R. 336-337) observed that "this Second Circuit does not subscribe to the opinion in some of the other circuits," and we indicated in our original petition that the differing circuits included the Third, Fifth, Eighth, Ninth, Tenth and the District of Columbia.

We now proceed to direct the Court's attention to several additional recent holdings casting doubt upon the decision herein, namely, *Guevara* v. *United States* (C. A. 5, 1957), 242 F. 2d 745 (requiring "inferences which excluded every reasonable hypothesis but that of guilt"); *Lattanzio* v. *United States* (C. A. 9, 1957), 243 F. 2d 801 (observing, at p. 803, that the Fifth Circuit "may apply a so-called 'special rule' as to review of cases involving circumstantial evidence on appeal"); and *Handford* v. *United States* (C. A. 5, 1958), 249 F. 2d 295. On the other hand, the Second Circuit quite recently, in *United States* v. *Moia* (C. A. 2, 1958), reiterated its disposition to adhere to the rule that jurors are not compelled to draw a conclusion of innocence where two inferences are possible from circumstantial evidence, predicating its holding on the authority of *Holland* v. *United States*, 348 U. S. 121, 99 L. Ed. 150. A reference to the latter opinion (p. 139) discloses no such rule, but merely an approval of the doctrine that circumstantial evidence need not exclude every reasonable hypothesis other than that of guilt.

The words of the late Judge Frank, in *United States* v. *Castro* (C. A. 2, 1956), on this very subject, to wit, the identity of degree of proof in criminal and civil cases, are still apposite:

> "If this court continues to apply its doctrine, I hope that, some day soon, the Supreme Court, because of the conflict in this area between this Circuit and some other Circuits, will decide what is the correct rule."

This Court has recently (March 31, 1958) indicated that its "duty as an appellate court is to assess the evidence as

a whole under the rigorous standards governing criminal trials." *Green* v. *United States,* 2 L. Ed. 2d 672; see also *Heikkinen* v. *United States,* 2 L. Ed. 2d 264.

Our arguments in this connection are substantial, and not previously fully developed especially in the light of the recent applicable authorities, so as to render rehearing eminently proper within the intendment of this Court's Rule 58.

II.

It is sumitted that the other points urged in support of the original petition herein are meritorious and were not refuted by the Government. Thus the failure to produce the paid informer and the exclusion of adequate cross-examination concerning him violated the rules laid down by this Court in *Roviaro* v. *United States,* 353 U. S. 53, 1 L. Ed. 2d 639, and *United States* v. *Reynolds,* 345 U. S. 1, 97 L. Ed. 727. Both of the latter holdings were reinforced by the decision in *Jencks* v. *United States,* 353 U. S. 657, 1 L. Ed. 1103.

Even with respect to the important evidence argument based upon the erroneous reception of proof that Gernie had in his possession a certain marked bill more than two months after an agent had given it to another person, the Government cited *Lee* v. *United States* (C. A. 9, 1957) 245 F. 2d 322, and urged that therein the Court held admissible proof that defendant possessed certain marked bills (used to buy narcotics) "immediately after such sale." Such proximity in point of time simply serves to strengthen petitioners' argument that a possession as remote as that herein disclosed was utterly inconsequential but evidence thereof was gravely prejudicial.

III.

The various points presented as justifying rehearing are not only matters of legal substance, but are also especially cogent in a case wherein there has been an unjust conviction of innocent individuals. The innocence of one rests upon his complete dissociation from the crimes charged at all stages of their alleged commission; that of the other upon a flagrant pattern of entrapment. If any want of judicial power to alleviate an unjust verdict stands as a bar to appellate review, surely the several errors presented by the record are a more than sufficient instrumentality for relief.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the order of this Court denying their petition for a writ of certiorari to the Court of Appeals for the Second Circuit be reheard and vacated and that the petition be granted.

Dated: New York, N. Y., June 19, 1958.

JACOB W. FRIEDMAN,
Attorney for Petitioners.

Certificate of Counsel

The undersigned, JACOB W. FRIEDMAN, attorney for petitioners, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 58 as amended, and that said petition for rehearing is not interposed for delay.

JACOB W. FRIEDMAN,
Attorney for Petitioners.